(15,230.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 866.

JAMES STEEL, ADMINISTRATOR OF BEN. HOLLADAY, DECEASED, APPELLANT,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES STEEL, Administrator of the Estate of Ben. Holladay, Deceased, Appellant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, Respondent.

Appeal from the circuit court of the United States for the district of Oregon.

Record.

It is stipulated in writing by the parties that only the following portions of the record herein shall be printed for use in this court:

2 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay, Plaintiff, *vs.* Joseph Holladay, Defendant, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, a Corporation, Defendant.

To the judges of the circuit court of the United States for the district of Oregon:

D. P. Thompson, of Portland, Oregon, and a citizen of the State of Oregon, by leave of court first thereunto had, brings this his amended bill against the Phœnix Insurance Company of Brooklyn, a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of the State of New York; and thereupon your orator complains and says—

That your orator now is and ever since the 19th day of May, A. D. 1884, has been the duly appointed, qualified, and acting receiver in the suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, which suit is now and at all times herein mentioned was pending and is undetermined in the circuit court of the State of Oregon for the county of Multnomah.

3 That the defendant, The Phœnix Insurance Company of Brooklyn, is and at all the dates and times herein mentioned was a corporation duly organized, existing, and doing a fire insurance business under and by virtue of the laws of the State of New York and having an office and doing business in the State of Oregon.

That from the 17th day of November, 1883, to and including the 19th day of May, A. D. 1884, and to the appointment and qualification of your orator, as herein alleged, one Edward S. Kearney, now and at all the dates and times herein mentioned a citizen of the State of Oregon, was the duly qualified, appointed, and acting re-

ceiver in said suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant.

That from the 17th day of November, A. D. 1883, continuously up to the time of its destruction by fire, as hereinafter stated, that certain four-story frame building then and at all times herein stated situated on the northwest corner of North First and F streets, in the city of Portland, Multnomah county, Oregon, and known as the Clarendon hotel, together with the furniture therein and the land upon which said building was situate, was in the joint possession and under the control of said Edward S. Kearney, as such receiver in said suit of Holladay against Holladay, and R. Koehler and J. N. Dolph (the one-half interest undivided in and to all of said property being owned by said R. Koehler and J. N. Dolph), and the title to the remaining undivided one-half thereof being involved and
4 in dispute in suit of Holladay against Holladay, and being in the possession and under the control of said Edward S. Kearney, as such receiver in said suit as aforesaid.

That in and by the orders appointing your orator and said Edward S. Kearney receiver in said suit of Holladay against Holladay such receiver was directed, authorized, and empowered to take possession of, manage, and control and keep the property above described safely and for the best interests of the parties who should finally be entitled thereto or as the court might direct.

That in the performance of his duty as such receiver the said Edward S. Kearney was, on the 21st day of April, 1884, as such receiver, desirous to insure against loss or damage by fire, for himself as such receiver and for his successors and for the benefit of whom it might concern, the said one-half interest in said Clarendon hotel building for the sum of four thousand dollars and the said one-half interest in the said furniture for the sum of one thousand dollars while said interests in said property were in said suit involved.

That said Edward S. Kearney, receiver as aforesaid and in his capacity and acting as such receiver and not otherwise, was solicited for said insurance by the defendant herein, and that it was on the said 21st day of April, A. D. 1884, understood and agreed between the defendant herein and the said Edward S. Kearney, as such receiver, that the said defendant would insure against loss or damage by fire the said one-half interest in said building and the furniture contained therein, the title to which was involved in said suit
5 of Holladay against Holladay, and make said loss and the policy of insurance payable to the said Edward S. Kearney, as such receiver in the suit of Holladay against Holladay, and his successors and for the benefit of whom it might concern in the sum of four thousand dollars on the said one-half interest in said building hereinbefore described and in the sum of one thousand dollars on the said one-half interest in said furniture therein for the full term of one year from the 27th day of April, A. D. 1884, at noon, and that it would receive as premium therefor the sum of three hundred dollars from said receiver.

And your orator further shows that thereafter, on the 21st day of April, 1884, the said defendant insurance company, with the intent

and design to carry into effect said agreement, did cause to be made a writing or policy of insurance, signed by its president and secretary and countersigned by its local agents at Portland, Oregon, bearing date the 21st day of April, 1884, a copy of which is hereunto annexed, marked Exhibit "A," and which your orator prays may be taken as a part of this his bill of complaint, and did then and there deliver said policy of insurance to said Edward S. Kearney, the then receiver in said suit.

And your orator further says that although when said insurance company, defendant, had so agreed to insure said building and furniture as aforesaid and for the amounts as aforesaid it was well known to said defendant that said Edward S. Kearney was merely the receiver in said suit of Holladay against Holladay, and that said property so agreed to be insured aforesaid was in dis-
6 pute in said suit, and that said Edward S. Kearney had no interest therein of any nature save as such receiver, and that when said agreement was made and said policy issued he was acting as such receiver and the premium therefor was to be paid out of the moneys in the hands of the receiver in said suit as such receiver, yet by accident and mistake of both said Edward S. Kearney and said defendant said insurance on said property mentioned was made payable by the terms of said policy to said Edward S. Kearney instead of to the receiver in the suit of Holladay against Holladay and his successors and for the benefit of whom it might concern, and said policy was issued without the usual clause commonly inserted in such policies and agreed upon, namely, that said insurance was effected for whom it might concern.

And your orator further says that said defendant knew and was distinctly informed by said Edward S. Kearney at the time when said insurance was agreed upon that he, the said Kearney, was the mere receiver in said suit and had no personal interest in said property and no interest whatever therein except as receiver in said suit, and was at that time distinctly informed by said Kearney, and so the fact was, that said property insured and to be insured was owned by either the plaintiff or defendant in said suit of Holladay against Holladay, and that said property and the title thereto was in litigation in said suit and was then in possession of and under the control of said receiver as such and not otherwise; and the said defendant did understand, consent, and agree, and at the time of said agreement to insure said one-half interest in said build-
7 ing and furniture was made with said receiver in such suit and before said policy of insurance so made to carry said agreement into effect was written and signed, that said insurance was to be made for the benefit of and on account of whomsoever was then or might thereafter be receiver in said suit and payable to such receiver in said suit for the benefit and on account of whomsoever was concerned in said suit; that the fact was and it was so understood by the defendant at said time that said Kearney was not the owner of said property or any thereof nor interested therein in any way except as before stated, and by mere *inadventure*, accident, and mistake in writing said policy of insurance it was omitted to be inserted

therein that said insurance was made by said receiver as receiver in said suit and for his successors as such and for the benefit of whom it might concern and was to be paid to the receiver in said suit as such in case of loss.

And your orator alleges that said policy was delivered by said defendant and was received by said Edward S. Kearney in the full belief and understanding that the interest of the parties to said suit of Holladay against Holladay in said building and furniture to the extent of the sums named in said policy was thereby insured and protected by said policy of insurance in accordance with the direction of said Kearney and in accordance with the understanding and agreement between him and the said defendant.

And your orator alleges that said defendant did not at once collect the premium due upon said policy, but did extend the customary credit therefor to the receiver in said suit of Holladay against Holladay as such receiver and not otherwise, and that said
8 premium was paid and accepted by said defendant, as is hereinafter more particularly alleged.

And your orator further says that on May 14th, 1884, an order was duly made and entered in said circuit court of the State of Oregon for Multnomah county in said suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, accepting the resignation of and removing said Edward S. Kearney as receiver in said suit and appointing your orator as such receiver, said resignation to take effect from the time when his successor had duly qualified and entered — the performance of his duties as such receiver, and said Kearney was therein and thereby directed that upon your orator duly qualifying as such receiver as aforesaid that said Kearney should deliver to your orator all property by him, said Kearney, held or controlled as receiver in said suit, which embraced, among other things, the policy of insurance herein mentioned and the property insured or intended to be insured thereby, and your orator says that thereafter, on May 19th, 1884, he, your orator, duly qualified as such receiver.

And your orator further says that on May 19th, 1884, at night, and after your orator had duly qualified as such receiver as aforesaid, but before the herein-described or any of the property in said suit involved was delivered to or came into the possession of your orator as such receiver, and while said insured property was still in the possession and control of said receiver, Edward S. Kearney, the said hotel building and the furniture therein and mentioned and described in said policy of insurance was, without any fault,
9 failure, neglect, or omission on the part of said Kearney or your orator or any other person or persons in any way interested therein, totally destroyed by fire. A loss was thereby caused to and sustained by said one-half interest in said building to whomsoever should be adjudged the owner thereof in said suit of more than nine thousand dollars and by said furniture contained therein or more than three thousand dollars.

And your orator submits that, by reason of the premises and the

payment of said insurance premium, as hereinafter alleged, he is justly and equitably entitled to have said mistake so made in drawing and writing said policy of insurance corrected and said policy reformed by adding therein after the words "Edward S. Kearney" the words "as receiver in the suit of Benjamin Holladay against Joseph Holladay, for and on account of his successors as such receiver and for the benefit of whom it might concern," and that the sum so insured by said defendant on said building and furniture be paid to your orator accordingly.

And your orator alleges that subsequent to said May 19th, 1884, and long prior to the commencement of this suit said policy of insurance was delivered by said Kearney to your orator and that your orator ever since has been and still is the holder thereof as such receiver.

And your orator says that said suit of Holladay against Holladay is still pending and undetermined in said circuit court of Multnomah county for the State of Oregon.

10 And your orator further says that he did in all respects comply with and fulfill all conditions and requirements on his part to be performed as required in said policy of insurance, and that he did, more than sixty days prior to the commencement of this suit and immediately after the fire at which said loss occurred, make and deliver to said defendant written notice of said fire, and did shortly thereafter and as soon as possible and more than sixty days prior to the commencement of this suit render a particular account of said loss occasioned by said fire to the defendant, which said particular account was signed and sworn to by your orator, and did contain therein a statement of other insurance and the written portion of other policies, also the interest of your orator in said destroyed property and the cash value of said property and the use to which said building described as hereinbefore was put and was used and all other requirements, as contained in section 9 of said policy; that said proofs of loss were duly delivered to and retained by said defendant and were by said defendant accepted without any manner of objection; that about thirty days after said fire and after the acceptance of said proof of loss by defendant your orator threatened to commence suit at once to recover said loss and informed the agents of the defendants that he would do so; that thereupon said defendant, by its said duly authorized agents, stated to your orator that under the provisions of said policy of insurance no suit could be brought until sixty days after the receipt of the proof of loss had elapsed and directed your orator's attention to the provisions in said policy limiting the commencement of suit as by said agents stated; that

11 said agents then and there did further represent that there was no question made as to the loss or its payment, except that the company was considering the fact that a change had occurred in the receivership in the cause of Holladay against Holladay; that said agents did then and there further assert and represent to your orator that they had written to said company, advising them to pay said loss, and informed your orator that the company

would undoubtedly do so; that thereafter, on the 27th day of June, A. D. 1884, the said defendant, by its said agents, did demand of your orator the payment of the premium upon said policy of insurance, and did at said time further assure and represent to your orator that said loss so insured against by said defendant would undoubtedly be paid as soon as the home office could act thereon; that, acting upon said representation then so made by said defendant, your orator did, on said 27th day of June, A. D. 1884, pay to said defendant the sum of three hundred dollars as a premium on said policy of insurance and three dollars for the State stamp thereon, which said sums were so accepted and received by said defendant at said time; that said sums were paid by your orator out of the funds in his hands as such receiver as aforesaid; that thereafter, and after the sixty days after the receipt of said proofs by defendant had elapsed, the said defendant, by its said agents, did again and repeatedly assure your orator that defendant would undoubtedly pay said loss as aforesaid; that by reason of said repeated assurances and promises of the said defendant company to your orator, made as aforesaid, he did neglect and fail to and was pre-

12 vented for some time after the sixty days after the delivery to said defendant of the proofs of loss had elapsed to bring his suit upon said policy and to recover the loss sustained by the peril insured against.

And your orator further alleges and says that long prior to the commencement of this suit your orator did apply to and request the said defendant, The Phœnix Insurance Company of Brooklyn, to act toward your orator in such a way as is fair, equitable, and just, and to correct and reform said policy of insurance as hereinbefore alleged, and to adjust and pay to your orator, as receiver as aforesaid in the said case of Holladay against Holladay, the sums so insured against by said defendant company on said building and furniture as aforesaid and so as aforesaid lost and destroyed by the peril insured against in and by said policy; and your orator well hoped that said defendant would have complied with your orator's request and would have yielded to his said application and paid to him the sums so insured by said defendant and the amount of such loss as aforesaid, but that said defendant neglected and refused and still does neglect and refuse to reform said policy or pay said loss or any part thereof, although your orator and his predecessor have complied with all the conditions in policy.

And your orator avers that heretofore, on July 9th, 1885, by an order duly made an- entered in and by the said circuit court of the State of Oregon for the county of Multnomah in the said suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, upon the petition of your orator in that behalf theretofore

13 duly filed in said cause and court, your orator was instructed, directed, and authorized to institute and prosecute this suit and to take all necessary and legal steps, either at law or in equity, in any court having jurisdiction of the subject-matter and parties, against said defendant to reform said policy of insurance and recover the amount thereof.

So may it please your honors to decree that said policy of insurance be reformed and said mistake corrected, so as to be made to contain fully and truly the agreements and understandings of the said receivers and said defendant as hereinbefore set forth and alleged, and that your honors will decree that said defendant do pay unto your orator all moneys due from said defendant by reason of said insurance and loss as aforesaid, to wit, the sum of five thousand dollars and interest thereon from the time when said loss was payable and the costs and disbursements of this suit, and that your orator may have such other and further relief herein as may seem just and equitable.

So may it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said defendant, thereby commanding it, at a certain day and under a certain pain and penalty to be therein specified, personally to be and appear before your honors in this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises as fully to all intents and purposes as if thereunto particularly interrogated, and to stand to, perform, and abide by such order and decree herein as to your honors shall seem meet; and your orator will ever pray.

FECHHEIMER & ACH,
Att'ys for Complainant.

14 STATE OF OREGON, } ss:
Multnomah County, }

I, D. P. Thompson, being first sworn, on oath say I am the complainant above named: that the foregoing bill of complaint is true, as I verily believe.

D. P. THOMPSON,
Receiver in Case of Holladay vs. Holladay.

Subscribed and sworn to before me this the 25th day of November, A. D. 1885.

[SEAL.]

J. B. THOMPSON,
Notary Public for Oregon.

EXHIBIT A.

(No. 68722.) ($5,000.)

By this policy of insurance the Phœnix Insurance Company of Brooklyn, in consideration of three hundred dollars, and subject to and under the conditions hereinafter mentioned, do insure E. S. Kearney, receiver for Holladay *vs.* Holladay, against loss or damage by fire to the amount of five thousand dollar, as follows: $4,000 on their one-half interest in the four-story frame building occupied as a hotel, and known as the "Clarendon hotel," situate on the northwest corner of North First and F streets, Portland, Oregon; $1,000 on their one-half interest in the hotel furniture, while contained therein.

Sum insured, $5,000.

15 Other concurrent insurance permitted.

And the said Phœnix Insurance Company hereby agrees to make good unto the said assured, their executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured, as above specified, nor the interest of the assured in the property except as herein provided, as shall happen by fire to the property so specified from the twenty-seventh day of April, one thousand eight hundred and eighty-four at 12 o'clock at noon to the twenty-seventh day of April, one thousand eight hundred and eighty-five, at 12 o'clock at noon, the amount of loss or damage, to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after the proofs of the same required by the company shall have been made by the assured, and received at the office in Chicago, and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy, unless the property be replaced or the company shall have given notice of their intention to rebuild or repair the damaged premises.

1. If any application, survey, plan or description of the property herein described is taken (whether said application, survey, plan or description be taken or signed subsequent or prior to the issue of this policy) such application, survey, plan or description shall be considered a part of this contract, and a warranty by the assured, and any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or any overvaluation, or any

16 misrepresentation whatever, either in a written application or otherwise; or if the assured shall have or shall hereafter make any other insurance (whether valid or not) on the property herein described, or any part thereof, without the consent of this company, written herein, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever without the consent of this company endorsed thereon; or if it be a manufacturing establishment, running in whole or in part over or extra time, or running at night; or if it shall cease to be operated, without special agreement endorsed on this policy, then, and in every such case, this policy is void. If the property be sold or transferred, or upon the commencement of foreclosure proceedings against, or a sale under a trust deed of; or the existence of a judgment lien upon; or the issue or levy of an execution against any kind of the property herein described; or if the property be assigned under any bankrupt or insolvent law; or any change take place in title or possession (except in case of succession by reason of the death of the assured) whether by legal process, or judicial decree, or voluntary transfer or conveyance: or if this policy shall be assigned before a loss, without the consent of the company endorsed hereon; or if the assured shall keep gunpowder, fireworks, nitro-glycerine, phosphorus, salpetre, nitrate of soda, petroleum or any of its products, naphtha, gasoline, benzine, benzole or benzine varnish; or keep or use camphine, gasoline, spirit gas, or any burning fluid or

chemical oils without written permission in this policy, then, and in every such case, this policy is void.

17 2. This insurance does not apply to or cover jewels, watches, plate, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models, curiosities, signs, unless particularly specified in this policy, and then not for an amount exceeding the actual cost of the same, unless by special agreement in policy.

This company shall not be liable, by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid; nor for any loss by theft at or after a fire; nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind; nor for any loss or damage by fire which may happen by means of or during an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire; nor in consequence of any neglect or deviation from the laws of regulations of police, where such exist; nor by lightning, unless specifically mentioned; nor for any loss caused by the bursting of a boiler, or by explosion from any cause, unless fire ensues, and then only for the loss or damage by the fire.

3. If a building shall fall, or any part thereof, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease and determine.

4. If the interest of the assured in the property be any other than the absolute fee-simple title or if any other person or persons

18 have any interest whatever in the property described, whether it be real estate or personal property, or if the building insured stands on leased ground, or if there be a mortgage or other incumbrance thereon; it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void. When the property shall be sold or encumbered, or otherwise disposed of, so that the interest or liability on the part of the assured herein named shall cease or be changed, this insurance on such property shall immediately terminate.

NOTE—By "property held in trust" is intended property held under a deed of trust, or under the appointment of a court of law, or property held as collateral security, in which latter case this company shall be held only to the extent of the interest of the assured in such property.

5. If during this insurance the above-mentioned premises shall become vacant or unoccupied, or if the occupation of such premises be changed except as herein specially agreed to in writing upon this policy then and from thenceforth, so long as the same shall continue vacant or unoccupied, or shall be so appropriated, applied or used, this policy shall cease and be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire, and in case of failure so to do, this company will not be liable for damage

caused by such failure, and there can be no abandonment to the company of the property described. The use of general terms,
19 or anything less than a distinct or specific agreement, clearly expressed and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

7. In case of any other insurance upon the property herein described, whether made prior or subsequent to the date of this policy (whether valid or not), the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner. Any floating, blanket or general policy or policies attaching in whole or in part to the property covered by this policy, shall, as between the assured and this company, be considered as contributing insurance for the full amount of such policy or policies, and liable, as such, to pay *pro rata* any loss, total or partial, on the property herein described.

Reinsurance, in case of loss, to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company.

When property covered by this policy is damaged by removal from a building exposed to loss by fire, such damage shall be borne by the insurers and insured in such proportion as the whole sum insured bears to the whole value of the property covered, of which proof, in due form required by this policy, shall be made by the claimant so insured.

20 8. This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy.

It is a part of this contract that any person other than the assured who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance.

9. Persons sustaining loss or damage by fire shall forthwith give notice in writing of said loss to the company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon, also the actual cash value of the property, and their interest therein; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof were used at the time of the loss; when and how the fire originated, and shall produce a certificate under the hand and seal

of a magistrate or notary public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise nor related to the assured) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured,
21 and verily believes that the assured has, without fraud, sustained loss on the property described to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, either before or after the rendering of the particular account of loss as heretofore provided, and subscribe to such examinations when reducing to writing, and shall also produce their books of account, bills, invoices and other vouchers, and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made, the assured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by the company, and as a part of the preliminary proofs of loss the assured shall, if the claim shall be for a building destroyed by fire, if requested so to do, furnish the company with plans or specifications of the buildings destroyed or damaged, which shall be duly verified by the oath of the assured, which said plans and specifications shall be conclusive against the assured as to the plan and description of the property described.

When personal property is damaged the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality and cost of each article.

22 10. The amount of sound value and of damage to the property, whether real or personal, covered by this policy or any part thereof may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall then, at the written request of either party, be submitted to competent and impartial arbitrators, one to be selected by each party, the two so chosen, in case of disagreement to choose a third, and the award of any two of whom, in writing under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract nor the liability of this company, nor any other question except only the amount of such loss or damage. Each party shall pay their own arbitrator, one-half the cost of third; that it shall be optional with the company to repair, rebuild or replace the property lost or damaged with like kind and quality within a reasonable time, giving notice of their intention to do so within sixty days after receipt of the proofs herein required, and until such proofs, plans and specifications, declarations and certificates are produced, and examinations and arbitrations permitted by the claimant and had, the loss shall not be payable.

In case of loss on property held in trust, or on commission, or if

the interest of the assured be other than the entire and sole ownership, the names of the respective owners and mortgagees shall be set forth, together with their respective interests therein.

If this policy is made payable, in case of loss, to a third party, or held as a collateral security, the proof of loss shall be made by the party originally insured, unless there has been an actual sale
23 of the property covered, consented to as required by the conditions of this policy. All fraud, or attempt at fraud, by false swearing or otherwise, shall forfeit all claim on this company, and shall be a complete bar to any recovery for loss under this policy. The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, or replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable reduction from the cost of replacing shall be made, to ascertain the actual cash value at the time of the fire.

11. All insurance of rents by this policy shall be understood and agreed to upon the terms, conditions and limitations following: The company shall indemnify the insured from any loss of rent he may sustain by a fire happening within the period limited to the building specified, whereby it shall have become untenantable. The loss shall be computed from the date of the fire, and shall cover the actual loss or rent by reason of the premises, or part thereof, having been rendered untenantable by fire, not exceeding the rate of rent per annum expressed in the policy by the sum insured thereon, and for a time not to exceed a period of twelve months; nor the time when the building can be made tenantable by the use of due diligence. It is also understood and agreed that the assured shall proceed without delay and with dispatch to repair or rebuild the damaged or burned building.

12. This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium thereon is paid and a receipt given for the same, with the sig-
24 natures of the president and secretary, and countersigned by the regular commissioned agent of the company, named thereon, and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing, but in case there shall have been any change in the risk, either within itself or neighboring buildings, at the time of renewal, the renewal shall be void.

Whenever this policy may have become void, from any cause it shall not be revived or reinstated by the issue of any renewal certificate or receipt, or in any other way, except by a special contract for such reinstating in writing thereon, or by the issuing of a new policy.

13. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within

twelve months next after the date of the fire from which such loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

☞Kerosene oil may be used for lights in dwellings, stores, churches and school-houses and kept for sale in stores in quantities not exceeding five barrels, to be drawn by daylight only.

25 ☞Steam-power threshers.—The use of steam power for threshing grain or pressing hay, without the consent of the company endorsed thereon, will avoid this policy.

☞Gas.—The generating or evaporating within the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, will avoid this policy, unless permitted in writing thereon. ☞Fences and other yard fixtures, also furniture and fixtures, contained in any building, are not insured under the within policy, unless separately and specifically mentioned. ☞Plate glass in doors and windows, when of the dimensions of nine square feet or more, and pier or mantel glasses or mirrors, are not covered by insurance on the building, but must be separately and specifically insured. ☞Frescoed work, or gilding on walls or ceilings, is not covered by insurance on the building, but must be separately and specifically insured.

☞Goods in show-windows, where lights are used, must be separately and specifically insured, otherwise they are not covered by this policy.

☞Builders' risk.—The working of carpenters, roofers, tinsmiths, gas-fitters, plumbers or other mechanics in building, altering or repairing the premises named in this policy will avoid the same, unless permission for such work be endorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs, without notice or endorsement.

26 ☞It is hereby understood and agreed, by and between this company and the assured, that this policy is made with reference to the foregoing terms and conditions, as to the classes of hazards and memoranda printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine their rights and obligations of the parties thereto, in all cases not herein otherwise specially provided for in writing.

In witness whereof, the Phœnix Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of Brooklyn, county of Kings, New York; but the same shall not be binding until countersigned by White and Riggen, agents for the company at Portland, Oregon.

PHILANDER SHAW, *Secretary.*

Countersigned at Portland, Oregon, this 21st day of April, 1884.

STEPHEN CROWELL, *President.*

WHITE & RIGGEN, *Agents.*

27 STATE OF OREGON, *Multnomah County,* } *ss:*

Due service of the within amended bill is hereby accepted at Portland, Oregon, this 25th day of November, 1885, by receiving a copy thereof, duly certified to as such by Henry Ach, counsel for complainant.

WILLIAMS & WILLIS,
Attorneys for Defendant.

Amended bill endorsed: Filed November 25, 1885. R. H. Lamson, clerk.

In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay, Plaintiff, *vs.* Joseph Holladay, Defendant, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, a Corporation, Defendant.

The demurrer of The Phœnix Insurance Company of Brooklyn, the above-named defendant, to the complainant's amended bill of complaint in the above-entitled cause.

This defendant, The Phœnix Insurance Company of Brooklyn, by protestation, not confessing or acknowledging all or any
28 of the matters or things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth, demurs thereto, and for cause of demurrer says that the complainant's said amended bill of complaint, in case the same were true, which this defendant in nowise admits, contains not any matter of equity whereon this court can ground any decree or give the complainant any relief or assistance as against this defendant for the reasons that—

1st. Said amended bill contains no matter showing that the complainant or Edward S. Kearney, the complainant's predecessor in office, was at the time of the making of the alleged contract with the defendant in the complainant's amended bill described authorized by the circuit court of the State of Oregon for the county of Multnomah to enter into such alleged contract.

2nd. Said amended bill contains matter showing that the complainant's right under the alleged contract with the defendant in said amended bill described is barred because he did not commence this suit within twelve months next after the date of the fire from which the loss described in said amended bill occurred.

Wherefore, and for divers other defects and causes of demurrer appearing in the said complainant's said amended bill, this defendant demurs thereto and humbly demands the judgment of this honorable court whether it shall be compelled to make any answer to

the said amended bill, and prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

WILLIAMS & WILLIS,
Solicitors and Counsel for Defendant.

29 STATE OF OREGON, } ss:
County of Multnomah, }

I, Milton W. Smith, being first duly sworn, say I am attorney-in-fact of the above-named defendant, and that the foregoing demurrer is not interposed for delay.

MILTON W. SMITH.

Subscribed and sworn to before me this 5th day of December, 1885.

[SEAL.] P. L. WILLIS,
Notary Public in and for the State of Oregon.

I, P. L. Willis, do hereby certify that I am solicitor and counsel for the above-named defendant, and that in my opinion the foregoing demurrer is well founded in point of law.

P. L. WILLIS.

STATE OF OREGON, } ss:
County of Multnomah, }

Due service of the within demurrer is hereby accepted at Portland, Oregon, this 5th day of December, 1885, by receiving a copy thereof, duly certified to as such by P. L. Willis, of counsel for defendant.

HENRY ACH,
Of Attorneys for Complainant.

Endorsed: Filed December 5, 1885. R. H. Lamson, clerk.

30 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver,
vs.
THE PHŒNIX INSURANCE COMPANY. } No. 1150.

DEC. 30, 1885.

Now, at this day, on motion of Mr. Henry Ach, of counsel for complainant, it is ordered that this cause be, and the same is hereby, set for hearing on the demurrer to the amended bill on Monday, January 4, 1886.

(Signed) DEADY, *J.*

Endorsed: Filed December 30, 1885. R. H. Lamson, clerk.

In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver,
vs.
THE PHŒNIX INSURANCE COMPANY. } No. 1150.

JAN. 29, 1886.

This cause was heard on the demurrer to the amended bill and was argued by Mr. P. L. Willis, of counsel for the defendant, and by Mr. Henry Ach, of counsel for the complainant; on consideration whereof it is ordered that said demurrer be, and the same is hereby, sustained, and that said amended bill be, and the same is hereby, dismissed, and that the defendant do have and recover *off* and from the complainant *his* costs and disbursements herein, taxed at —— dollars.

(Signed) DEADY, *J.*

Endorsed: Filed January 29, 1886. R. H. Lamson, clerk.

31 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay *vs.* Joseph Holladay, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, in the State of New York, Defendant. } Suit No. 1150.

The complainant in the above-entitled suit, being aggrieved by the final decree rendered therein and entered on the 29th day of January, 1886, appeals from the said final decree and from the whole thereof to the Supreme Court of the United States and prays that this his appeal be in all things allowed, and that a full transcript in all things complete as by law provided and duly authenticated of the record, proceedings, and evidence adduced in the said suit be transmitted with this appeal to the Supreme Court of the United States.

WILLIAMS, ACH & WOOD,
Solicitors for Complainant.

Endorsed: Filed June 25, 1886. R. H. Lamson, clerk.

32 UNITED STATES OF AMERICA, *ss:*

Seal of United States Supreme Court.

The President of the United States of America to the honorable the judges of the circuit court of the United States for the District of Oregon, Greeting:

Whereas lately, in the circuit court of the United States for the district of Oregon, before you or some of you, in a cause between D. P. Thompson, receiver in the suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, complainant, and The

Phœnix Insurance Company of Brooklyn, defendant, wherein the decree of the said circuit court entered in said cause on the 29th day of January, A. D. 1886, is in the following words, viz: "This cause was heard upon the demurrer to the amended bill and was argued by Mr. P. L. Willis, of counsel for defendant, and by Mr. Henry Ach, of counsel for the complainant; on consideration whereof it is ordered that the demurrer be, and the same is hereby, sustained, and that said amended bill be, and is hereby, dismissed, and that the defendant do have and recover of and from the complainant *his* costs and disbursements herein taxed at —— dollars," as by the inspection of the transcript of the record of the said circuit court, which *were* brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and — large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-nine, the said
33 cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel: On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said complainant recover against the said defendant, The Phœnix Insurance Company of Brooklyn, one hundred and seventeen dollars for his costs herein expended and have execution therefor; and it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court for further proceedings not inconsistent with the opinion of this court.

MAY 19, 1890.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and ninety.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

34 *Costs of Complainant.*

Clerk	$52 50
Printing record	44 50
Attorney	20 00
	$117 00

Endorsed: Filed August 6, 1890. R. H. Lamson, clerk.

In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay *vs.* Joseph Holladay,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN. } No. 1150.

AUGUST 8, 1890.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. Stewart B. Linthicum, of counsel, and presents to the court the mandate of the Supreme Court of the United States in this cause, now on file, in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

Seal of United States Supreme Court.

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Oregon, Greeting:

Whereas lately, in the circuit court of the United States for
35 the district of Oregon, before you or some of you, in a cause between D. P. Thompson, receiver in the suit of Benjamin Holladay, plaintiff, against Joseph Holladay, defendant, complainant, and The Phœnix Insurance Company of Brooklyn, defendant, wherein the decree of the said circuit court entered in said cause on the 29th day of January, A. D. 1886, is in the following words, viz: "This cause was heard upon the demurrer to the amended bill and was argued by Mr. P. L. Willis, of counsel for the defendant, and by Mr. Henry Ach, of counsel for the complainant; on consideration whereof it is ordered that the demurrer be, and the same is hereby, sustained, and that said amended bill be, and the same is hereby, dismissed, and that the defendant do have and recover of and from the complainant *his* costs and disbursements herein, taxed at —— dollars," as by the inspection of the transcript of the records of the said circuit court, which *were* brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-nine, the said case came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel: On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said complainant recover against the said defendant, The Phœnix Insurance Company of
Brooklyn, one hundred and seventeen dollars for his costs
36 herein expended and have execution therefor; and it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court for further proceedings not inconsistent with the opinion of this court.

MAY 19, 1890.

You, therefore, are hereby commanded that such execution and further proceedings be had in such cause, in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and ninety.

Costs of Complainant.

Clerk	$52 50
Printing record	44 50
Attorney	20 00
	$117 00

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

37 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay, Plaintiff, *vs.* Joseph Holladay, Defendant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, a Corporation.

The petitioner states to the court that one Benjamin Holladay brought suit in the circuit court of the State of Oregon for Multnomah county to establish his title and ownership of certain real estate that had been conveyed to Joseph Holladay, who claimed to be the absolute owner of the same; that the supreme court of the State of Oregon on the appeal of said suit decided that Benjamin Holladay held the absolute title to said real property, and thereupon all claims of Joseph Holladay to or upon said real estate were settled and relinquished; that the aforesaid suit is the same set out in the title of this case as the suit of Benjamin Holladay, plaintiff, *vs.* Joseph Holladay, defendant.

That D. P. Thompson, receiver in the suit of Benjamin Holladay, plaintiff, *vs.* Joseph Holladay, defendant, as set out in the title of this case, was discharged from said receivership by an order of the circuit court of the State of Oregon for the county of Multnomah made on July 12, 1886.

That on the 12th day of July, 1886, Joseph Holladay and Geo. W. Weidler were appointed by the aforenamed circuit court as receivers in the place of said D. P. Thompson, discharged.

38 That on the — day of —— the said Joseph Holladay and Geo. W. Weidler were discharged from the aforesaid receivership by order of the court in which they were appointed.

That the aforesaid Benjamin Holladay died on the 8th day of

July, A. D. 1887, leaving a last will and testament, which was duly admitted to probate by the county court of the State of Oregon for Multnomah county, and the same has since been and now is in full force and effect as the last will of the said Benjamin Holladay.

That the petitioner, James Steel, was thereafter, on the third day of June, A. D. 1889, duly appointed administrator with the will annexed of the estate of said Benjamin Holladay, deceased, and that he is now the duly qualified and acting administrator of said estate.

That all the questions at issue in the suit of Benjamin Holladay, plaintiff, *vs.* Joseph Holladay, defendant, set out in the title of this case, have been settled and fully disposed of, and that there is no receiver in said cause at present nor does there exist any cause for one.

Wherefore your petitioner asks to be substituted as party plaintiff in the above action and admitted to all rights as such in the further prosecution of this case.

JAMES STEEL,
Administrator with the Will Annexed of the Estate of Benjamin Holladay, Deceased.
WILLIAMS & WOOD,
MITCHELL & TANNER,
Attorneys for Petitioner.

39 DISTRICT OF OREGON, } *ss.*
State of Oregon, County of Multnomah, }

I, James Steel, being duly sworn, on oath say that I am the petitioner in this case, and that the allegations set forth in said petition are true, as I verily believe.

JAMES STEEL.

Subscribed and sworn to before me this 3d day of October, 1890.
[SEAL.] S. B. LINTHICUM,
Notary Public for Oregon.

Endorsed: Filed October 3, 1890. R. H. Lamson, clerk.

In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver,
vs.
THE PHŒNIX INSURANCE COMPANY. } No. 1150.

OCTOBER 3, 1890.

Now, at this day, comes the plaintiff, by Mr. C. E. S. Wood, of counsel, and the defendant, by Mr. P. L. Willis, of counsel, and on motion of said plaintiff it is ordered that James Steel, administrator of the estate of Ben. Holladay, deceased, be, and he is hereby, substituted as plaintiff in this cause, and that the defendant be, and he is hereby, allowed thirty days from this date in which to answer the amended bill herein.

40 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay against Joseph Holladay, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, a Corporation, Defendant.

It is hereby stipulated and agreed by and between the parties hereto that the defendant may have to and including the 3d day of December, A. D. 1890, within which to answer in the above-entitled cause.

WILLIAMS & WOOD,
Attorneys for Complainant.
R. WILLIAMS AND P. L. WILLIS,
Attorneys for Defendant.

Endorsed: Filed November 1, 1890. R. H. Lamson, clerk.

41 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay against Joseph Holladay, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, a Corporation, Defendant.

It is hereby stipulated and agreed by and between the parties hereto that the defendant may have to and including the 13th day of December, A. D. 1890, within which to answer in the above-entitled cause.

WILLIAMS & WOOD,
Attorneys for Complainant.
P. L. WILLIS,
Of Attorneys for Defendant.

Endorsed: Filed November 29, 1890. R. H. Lamson, clerk.

42 In the Circuit Court of the United States for the District of Oregon.

D. P. THOMPSON, Receiver in the Suit of Benjamin Holladay, Plaintiff, *vs.* Joseph Holladay, Defendant, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, a Corporation, Defendant.

Answer of Defendant to the Complainant's Amended Bill of Complaint.

The defendant, saving and reserving to itself all right of exception to the said amended bill of complaint, for answer thereto saith as follows:

This defendant admits that the complainant is and ever since the 19th day of May, 1884, has been the duly appointed, qualified, and acting receiver in the suit of Holladay *vs.* Holladay, and that said suit is now pending and undetermined, as in said amended bill alleged.

This defendant admits that it is and at all the times in said amended bill mentioned was a corporation organized under the laws of New York and doing business in the State of Oregon, as in said amended bill alleged.

And this defendant also admits that from the 17th of No-
43 vember, 1883, to and including the 19th day of May, 1884, and until the appointment and qualification of the complainant one Edward S. Kearney was the duly appointed, qualified, and acting receiver in said suit of Holladay *vs.* Holladay, and further admits that from the 17th day of November, A. D. 1883, continuously until the appointment and qualification of the complainant as receiver as aforesaid, on the 19th day of May, 1884, the said Edward S. Kearney, as such receiver, had jointly with R. Koehler and J. N. Dolph the possession and control of the four-story frame building known as the Clarendon hotel, together with the furniture therein and the land upon which the said building was situated, as in said amended bill alleged, the title to an undivided one-half thereof being involved and in dispute in said suit of Holladay *vs.* Holladay and being in the possession and under the control of said Edward S. Kearney, as such receiver; that this defendant has no knowledge on the subject, but is informed and believes that the said Edward S. Kearney, as such receiver, did not at any time have the actual or any other than the constructive possession or control of said property, and that all possession and control of the said Edward S. Kearney in respect of said property ceased upon the appointment and qualification of the complainant as receiver on the said 19th day of May, 1884, and that the said complainant upon and after his appointment and qualification acquired and had such possession and control.

And this defendant saith as to the terms of the orders appointing the said complainant and the said Kearney receiver in said suit of
Holliday *vs.* Holliday it has no knowledge on the subject, but
44 believes them to be as alleged in said amended bill of complaint, and that thereby the receiver was directed, authorized, and empowered to take possession of, manage and control the said property safely and for the best interests of the parties who should finally be entitled thereto, but for greater certainty as to said orders defendant craves leave to refer to the same when produced.

This defendant is informed and believes it to be true that the said Edward S. Kearney, on the 21st day of April, 1884, was desirous to insure for himself as such receiver the one-half interest in the property above described for the aggregate sum of five thousand dollars, as in said amended bill alleged, but upon its information and belief denies that the said Edward S. Kearney was desirous of insuring for his successors or for the benefit of whom it might con-

cern otherwise than as represented by himself while acting as such receiver.

And this defendant is further informed and believes it to be true that the said Edward S. Kearney, in the capacity of such receiver and acting as such and not otherwise, was solicited for insurance upon said property by the local agents of this defendant, and that it was upon the 21st day of April, 1884, understood and agreed between this defendant, acting by its said local agents and the said Edward S. Kearney as such receiver, that this defendant would insure the said one-half interest in said building and the furniture contained therein against loss or damage by fire and make said loss and the policy of insurance payable to the said Edward S. Kearney as such receiver in the suit of Holl-
45 laday *vs.* Holladay, in the sum of four thousand dollars on the said building and one thousand dollars on the said furniture, for the term of one year and for a premium of three hundred dollars to be received by it from said receiver, but this defendant on information and belief and having no other knowledge on the subject denies that it was on said day or at any time agreed by this defendant or its said local agents that the said loss or the said policy of insurance should be made payable to the successors of the said Edward S. Kearney, as such receiver, for the benefit of whom it might concern or otherwise than to the said Edward S. Kearney as such receiver alone.

This defendant admits that it did cause to be made a policy of insurance, signed by its president and secretary and countersigned by its local agents and bearing date the 21st of April, 1884, a copy of which, marked Exhibit A, is annexed to the said amended bill of complaint, and did on the 21st day of April, 1884, deliver the said policy of insurance to the said Edward S. Kearney, then receiver in said suit; but this defendant says that the said policy of insurance was prepared and countersigned by its said local agents upon a blank form of policy, signed by its president and secretary, and was by said local agents delivered to the said Edward S. Kearney, and this defendant upon information and belief denies that the same was prepared or countersigned or delivered with the intent or design to carry into effect any agreement that the loss or the policy should be made payable to the successors of the said Edward S. Kearney, as receiver, or for the benefit of whom it might concern or otherwise than to the said Edward S. Kearney as receiver alone.

46 And this defendant admits that when it agreed to insure said building and furniture it was well known to it, through its said local agents, that the said Edward S. Kearney was merely the receiver in said suit of Holladay *vs.* Holladay, and that said property so agreed to be insured was in dispute in said suit, and that the said Edward S. Kearney had no interest therein of any nature save as such receiver, and that when the agreement to insure was made and the said policy issued he was acting as such receiver, and the premium therefor was to be paid out of moneys in his hands as such receiver, but upon information and belief denies that by acci-

dent or mistake of both or either said Kearney or this defendant or its local agents said insurance was made payable by the terms of said policy to said Edward S. Kearney instead of to the receiver in the suit of Holladay *vs.* Holladay and his successors and for the benefit of whom it might concern, or that by such or any accident or mistake said policy was issued without the clause that said insurance was effected for whom it might concern; and this defendant upon its information and belief denies that said clause last mentioned was agreed upon or is usually or commonly inserted in such policies, and denies that it was at any time agreed that said policy should be made payable otherwise than as the same is written or, that there was any accident or mistake of either party thereto in the preparation or delivery of the same.

And this defendant further admits that it knew and was distinctly informed by the said Edward S. Kearney when said insurance was agreed upon that he was merely the receiver in
47 said suit and had no personal interest in said property and no interest whatever therein except as such receiver, and that this defend- was also informed and so the fact was that such property was owned by either the plaintiff or defendant in said suit of Holladay *vs.* Holladay, and that the said property and the title thereto was in litigation in said suit and was in possession and under the control of said receiver as such and not otherwise, but this defendant on its information and belief denies that it or its said agents did understand, consent, or agree at the time of the agreement to insure said property or before said policy was written or signed or at any time that said insurance was to be made for the benefit of or on account of whomsoever was then or might thereafter be receiver in said suit or payable to such receiver for the benefit or on account of whomsoever was concerned in said suit or did understand, consent, or agree that said insurance was to be made otherwise than as the same is expressed in said policy, a copy of which is annexed to said amended bill of complaint. This defendant admits that the fact was and that it was so understood by this defendant and its said agents that the said Kearney was not the owner of the said property or any part thereof nor interested therein except as such receiver, but on information and belief denies that by inadvertance, accident, or mistake in writing said policy it was omitted to be inserted therein that said insurance was made by said receiver as receiver in said suit and for his successors as such and for the benefit of whom it might concern or was to be paid to the receiver in said suit as such in case of loss, and denies that there was any inadvertence, accident, or mistake in writing said policy.

48 This defendant admits that the said policy was delivered by the defendant and received by the said Edward S. Kearney in the full belief and understanding that the interest of the parties to said suit of Holladay *vs.* Holladay in said building and furniture to the extent named in said policy was thereby insured and protected in accordance with the directions of the said Kearney and the understanding and agreement between him and this defendant, but

this defendant on its information and belief denies that the direction of the said Kearney or the understanding or agreement between him and this defendant were other or different from those expressed and carried out in the said policy of insurance delivered to him and referred to in said amended bill of complaint.

This defendant admits that it did not at once collect the premium due upon said policy, but did extend the customary credit therefor to the said receiver as such and not otherwise, and that said premium was paid to and accepted by the local agents of this defendant, as hereinafter stated.

This defendant is informed and believes it to be true that on May 14, 1884, an order was duly made and entered by the court in the said suit of Holladay *vs.* Holladay accepting the resignation of the said Edward S. Kearney as receiver and appointing the said complainant as receiver in his stead and directing the said Kearney, upon the said complainant having qualified as such receiver, to deliver to him all property held or controlled by said Kearney as receiver in said suit, including the said policy of insurance, but this defendant for greater certainty craves leave to refer to the said order of said court when produced.

49 This defendant admits that on the 19th day of May, 1884, the said complainant duly qualified as such receiver, and that thereafter, on the night of said last-named day, the said property so insured, without any fault, failure, neglect, or omission on the part of the said complainant or the said Kearney or any other person, was totally destroyed by fire, and that a loss thereby was caused to and sustained by whomsoever should be adjudged to be the owner thereof in said suit amounting in respect of said building to more than nine thousand dollars and in respect of said furniture to more than three thousand dollars; but this defendant on its information and belief denies that said destruction or loss by fire occurred before the said property was delivered to or came into the possession of the complainant as receiver or while the said property was still in the possession or control of the said Edward S. Kearney as receiver or otherwise.

This defendant upon its information and belief denies that any mistake was made in drawing or writing said policy of insurance, or that by reason of any of the matters alleged in said amended bill of complaint or the payment of the premium as therein alleged the said complainant is entitled to have any reformation, correction, or addition made in or in respect of said policy by inserting therein after the words "Edward S. Kearney" the words "as receiver in the suit of Benjamin Holladay against Joseph Holladay for and on account of his successors as such receiver and for the benefit of whom it might concern," or by inserting therein any other words or making any other modification thereof, or is entitled to have the sum so insured by defendant paid to the said complainant.

50 And this defendant says that it has no knowledge, information, or belief on the subject and cannot answer whether subsequent to May 19th, 1884, or at what time said policy was delivered by said Kearney to the said complainant, but this defendant

believes that the same was so delivered long prior to the commencement of this suit, and that said complainant since has been and is the holder thereof as such receiver, and that said suit of Holladay *vs.* Holladay is still pending and undetermined.

And this defendant admits that the said complainant did in all respects comply with and fulfill all conditions and requirements on his part to be performed as required in said policy, and did, more than sixty days prior to the commencement of this suit and immediately after said fire, make and deliver to defendant written notice thereof and render a particular account of the loss occasioned by said fire, with other proofs thereof, as required by section 9 of said policy and as alleged in said amended bill of complaint.

This defendant admits that said proofs of loss were duly delivered to and retained by it and accepted without any manner of objection thereto or to the form thereof, but that this defendant then and at all times denied any liability to the said complainant upon or in respect of the said policy or the insurance of said property.

This defendant is informed and believes it to be true that about thirty days after said fire, to wit, on the 6th day of June, 1884, and after the acceptance of said proofs the said complainant threatened to commence suit at once to recover said loss and informed the agents of the defendant that he would do so, and is in-
51 formed and believes it to be true that the said local agents of this defendant thereupon stated to said complainant that under the provisions of the said policy no suit could be brought until sixty days after the receipt of the proofs of loss had elapsed, and directed his attention to the provisions in said policy so limiting the commencement of suit. This defendant has no knowledge or information on the subject and cannot answer whether said or any agents of this defendant did then or there or at any time or place represent that there was no question made as to the loss or its payment, except that the company was considering the fact that a change had occurred in the receivership in said cause of Holladay *vs.* Holladay, or did assert or represent to complainant that they had written to the company, this defendant, advising it to pay said loss or informed this complainant that the company would undoubtedly so do.

This defendant has no knowledge or information whether on the 27th day of June, 1884, the said local agents did demand of said complainant payment of the premium upon said policy, but is informed and believes it to be true that said complainant did pay to said local agents on said day the sum of three hundred dollars as a premium on said policy and three dollars for the State stamp thereon, and that said sums were so accepted and received by said local agents at said time and were paid by said complainant out of the funds in his hands as such receiver, but this defendant on information and belief denies that on said 27th day of June, 1884, or at the time of demanding payment of said premium the said local agents or any agents of this defendant did assure or represent
52 to complainant that said loss would undoubtedly be paid as soon as the home office could act thereon, or that said payment was made by said complainant acting upon said alleged rep-

resentation, and upon information and belief denies that thereafter and after the sixty days after receipt of said proofs of loss had elapsed the said local agents or any agents of the defendants did again or repeatedly assure complainant that defendant would undoubtedly or at all pay said loss, or that by reason of said alleged or any repeated assurances or promises of this defendant or its said local or any agents made to complainant he did neglect or fail to or was prevented for some time or any time after sixty days after the delivery of said proofs of loss to bring his suit on said policy or to recover the loss sustained by the peril insured against.

And this defendant says that its said local agents were not nor were any agents of this defendant by it at any time authorized to make any of said representations, assertions, or promises or to make or give any of said assurances; that this defendant, immediately upon learning of said fire and of the fact that the said complainant had been appointed receiver as aforesaid, denied any liability upon said policy and directed its said local agents not to take any action in the adjustment of said loss nor to admit any liability on the part of this defendant in respect thereof; that said direction to said local agents was first made on the 20th day of May, 1884, and was repeated at divers times thereafter until the 14th day of June, 1884, at which time they were informed by telegram that the defendant at its head office, having taken the advice of its counsel, was advised that it was not liable in respect of said loss; that this defendant at all the times thereafter denied any liability upon the said policy,
53 and that on the 31st day of August, 1884, one of its general agents for the Pacific coast, being temporarily at Portland, in the State of Oregon, expressly declared to said complainant that the defendant denied any liability upon said policy and did refuse and would at all times refuse to pay said loss; and this defendant upon its information and belief alleged that said complainant was at all times after the said 20th day of May, 1884, informed and advised that this defendant so denied and repudiated any liability upon said policy and had so informed and directed its said local agents as aforesaid; that the said complainant was not induced at any time or for any period to abstain from commencing suit upon said policy by any act of this defendant or of its agents or by any statement, promise, or assurance made or given by it or them.

This defendant further says that the demand or receipt by the said local agents of the said sums of three hundred dollars and three dollars on the 27th day of June, 1884, was not authorized or approved by it, and on being thereafter informed thereof this defendant forthwith disapproved the said action of its said local agents and directed the said sums of money to be forthwith repaid to the complainant; and this defendant upon its information and belief alleges that the said sums were thereafter and without delay offered and tendered back to complainant, but that said complainant refused and ever since has refused to accept or receive the same.

That the said complainant did not commence any suit or action against this defendant for the recovery of any claim by virtue of said policy within twelve months next after the date of said fire nor

until the 10th day of July, 1885, and this defendant relies upon the terms and provisions in said policy on that behalf.

54 This defendant admits that it has refused to correct or reform said policy as requested by complainant or to pay said loss or any part thereof, and also admits that said complainant and his predecessor have complied with all the conditions of said policy save those respecting change of title or possession of the property insured and the commencement of suit or actions within twelve months after date of the fire.

This defendant is informed and believes it to be true that on July 9th, 1885, an order was made in said suit of Holladay *vs.* Holladay directing and authorizing complainant to institute and prosecute this suit as in said amended bill alleged, but for greater certainty this defendant craves leave to refer to said order when produced.

Wherefore, having fully answered, this defendant prays that it be hence dismissed with its costs.

P. L. WILLIS,
Of Solicitors for Defendant.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

H. A. Craig, being first sworn, on oath says that The Phœnix Insurance Company, the defendant in the foregoing suit, is a corporation incorporated under the laws of the State of New York; that deponent is one of the general agents of said defendant for

55 the States and Territories of the Pacific coast and makes this verification on its behalf; that deponent has read the foregoing answer, and that the same is true as he verily believes.

H. A. CRAIG.

Subscribed and sworn to before me this 10th day of December, 1890.

[SEAL.] E. H. THARP,
Notary Public.

Service by copy of the foregoing at Portland, Oregon, is hereby admitted this 12th day of December, A. D. 1890.

WILLIAMS & WOOD,
Solictors for Complainant.

Endorsed: Filed December 12, 1890. R. H. Lamson, clerk.

In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator with the Will Annexed, of the Estate of Ben. Holladay, Deceased, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, a Corporation, Defendant.

Replication of complainant in the above cause to the answer of The Phœnix Insurance Company of Brooklyn, a corporation, defendant.

56 This repliant, saving and reserving all advantage of exceptions to the manifold insufficiencies of said answer, for replication thereto says that he will aver and prove his said bill to be true and sufficient, and that the said answer is untrue and insufficient; wherefore he prays relief as in said bill set forth.

WILLIAMS & WOOD,
Solicitors for Complainant.

Due service of the within replication by certified copy, as provided by law, is hereby admitted at Portland, Or., Dec. 22, 1890.

P. L. WILLIS,
Of Solicitors for Defendant.

Endorsed: Filed December 22, 1890. R. H. Lamson, clerk.

In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator,
vs.
THE PHŒNIX INSURANCE COMPANY. } No. 1150.

MARCH 20, 1891.

Now, at this day, on motion of Mr. George H. Williams, of counsel for plaintiff, it is ordered that said plaintiff be, and he is hereby, allowed until May 1, 1891, in which to take his testimony herein.

57 In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator of Benjamin Holladay, Deceased,
vs.
THE PHŒNIX INSURANCE COMPANY.

To the clerk of the above-entitled court:

You will please enter my appearance as solicitor in the above-entitled cause for the defendant.

L. B. COX.

In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator,
vs.
THE PHŒNIX INSURANCE COMPANY. } No. 1150.

APRIL 3, 1891.

Now, at this day, comes the plaintiff, by Mr. George H. Williams, of counsel, and the defendant, by Mr. L. B. Cox, of counsel, and on motion of said defendant it is ordered that said defendant be, and it is hereby, allowed until June 1, 1891, in which to take its testimony herein, and that said plaintiff have two weeks thereafter to take his testimony in rebuttal.

58 In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator of the Estate of Ben. Holladay, Deceased, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, Defendant. } Stipulation.

Stipulation between the complainant and defendant that the court make an order enlarging the time for taking testimony.

Inasmuch as the defendant has been unable by reason of the absence of its witnesses and the remoteness of their place of residence from the city of Portland to take the testimony of its witnesses in this cause, and not sufficient time remains to complete the taking of the testimony of defendant and the testimony of complainant in rebuttal within the time limited by the rules of court for the taking of testimony, it is hereby stipulated and agreed by and between the complainant and defendant that the time for taking testimony in this cause be enlarged; that defendant have until July 20 within which to take testimony for its defense, and that complainant have fifteen days from such date within which to take testimony in rebuttal, and that the court so provide by order dated May 28, 1891.

WILLIAMS & WOOD,
Solicitors for Complainant.

59

L. B. COX,
J. N. TEAL,
WIRT MINOR,
Solicitors for Defendant.

Endorsed: Filed May 28, 1891. R. H. Lamson, clerk.

In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator of the Estate of Ben. Holladay, Deceased, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, Defendant.

Motion of defendant for an order enlarging the time for taking testimony in this cause.

Comes now the defendant and moves the court for an order enlarging the time for taking the testimony in this cause pursuant to the stipulation on file herein.

L. B. COX,
Solicitor for Defendant.

Service by copy admitted at Portland, Or., May 28, 1891.

WILLIAMS & WOOD,
Attorneys for Complainant.

Endorsed: Filed May 28, 1891. R. H. Lamson, clerk.

60 In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator,
vs.
THE PHŒNIX INSURANCE COMPANY. } No 1150.

MAY 29, 1891.

Now, at this day, on motion of Mr. Lewis B. Cox, of counsel for the defendant, and upon the stipulation of the parties herein filed, it is ordered that the time allowed said defendant for taking its testimony herein be, and the same is hereby, extended till July 20, 1891, and that said plaintiff have fifteen days thereafter in which to take his testimony in rebuttal.

In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator,
vs.
THE PHŒNIX INSURANCE COMPANY. } No. 1150

JULY 24, 1891.

Now, at this day, on motion of Mr. Lewis B. Cox, of counsel for the defendant, it is ordered that this cause be, and the same is hereby, set for final hearing on Monday, August 10, 1891.

61 In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administator,
vs.
THE PHŒNIX INSURANCE COMPANY. } No. 1150.

AUGUST 5, 1891.

Now, at this day, on motion of Mr. Lewis B. Cox, of counsel for the defendant, it is ordered that the final hearing of this cause be, and the same is hereby, continued until Monday, August 24, 1891.

In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator of the Estate of Ben. Holladay, Deceased,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN. } No. 1150.

OCT. 19, 1891.

This cause was heard upon the amended bill, the answer, replication, and the testimony and exhibits, and was argued by Mr. George H. Williams, of counsel for the plaintiff, and by Mr. L. B. Cox and Mr. W. S. Goodfellow, of counsel for the defendant. On consideration whereof the court finds—

62 That on April twenty-first, eighteen hundred and eighty-four, the defendant, in consideration of the sum of three hundred dollars paid to it by E. S. Kearney, insured him as receiver for Holladay *vs.* Holladay in the sum of five thousand dollars against loss or damage by fire on a half interest in the Clarendon hotel and furniture for the term of one year from April 27, 1884, and that said property was destroyed by fire on May nineteenth, eighteen hundred and eighty-four; that said defendant refused to pay said policy, and this suit was commenced by D. P. Thompson, as the successor of said E. S. Kearney in said receivership, to have said policy reformed and the amount thereof paid to him as such receiver; that it was provided in said policy that suit should be commenced to collect the same within twelve months next after the date of the fire from which the loss occurred, and that this suit was not brought for more than twelve months after the date of said fire; that said D. P. Thompson, as such receiver, had a reasonable time after the refusal of said defendant to pay said policy and during said twelve months in which to have brought this suit, and that by his failure to do so the plaintiff herein is now barred by the limitation in said policy from any right to have said policy reformed or to collect the amount thereof. It is therefore adjudged and decreed that the amended bill herein be, and the same is hereby, dismissed, and that said defendant do have and recover of and from said plaintiff its costs and disbursements herein, taxed at $123.05.

(Signed) DEADY, *J.*

Endorsed: Filed October 19, 1891. R. H. Lamson, clerk.

63 In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator of the Estate of Ben. Holladay, Deceased,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN. } No. 1150.

MONDAY, *October* 13, 1891.

(1.) Waiver of limitation within which to sue on a policy of fire insurance. A twelve months' limitation in a policy of fire insurance within which the assured must sue for a loss is not waived by conduct of the insurance company calculated to make the former believe that the loss will be paid, provided such conduct ceases, so as to leave a reasonable time within which to sue, and seven months of the twelve is considered ample time.

(2.) Limitation from the date of fire. A limitation of twelve months from the date of the fire within which to sue on a policy of fire insurance commences to run from such date. The ruling on this point in 11 Saw., 276, followed.

DEADY, *J.*:

On April 21, 1884, the defendant, in consideration of the sum of three hundred dollars paid to it by Edward S. Kearney, insured him as "receiver for Holladay *v.* Holladay" in the sum of $5,000 against loss or damage by fire on a half interest in the Clarendon hotel and furniture for a term of one year from the
64 27th of the month, and on the night of May 19th following the property was destroyed by fire.

This suit was brought on July 10, 1885, by D. P. Thompson, as the successor of Kearney in the receivership, to reform the policy, which it is alleged in the bill was made payable to Kearney "instead of the receiver in the suit of Holladay *v.* Holladay and his successors, for the benefit of whom it might concern."

There was a demurrer to the bill on the ground that the plaintiff's right of action was barred because the suit was not commenced "within twelve months next after the date of the fire from which the loss occurred," as provided in the policy.

The demurrer was sustained (11 Saw., 276; 25 Pad. Rep., 296), and the receiver filed an amended bill alleging therein conduct on the part of the defendant which he claimed amounted to a waiver of this limitation. There was a demurrer to this bill also, which was sustained and the suit dismissed.

On July 12, 1886, Thompson was removed from the receivership and George W. Weidler and Joseph Holladay were appointed in his place. Thereafter the suit of Holladay *v.* Holladay was decided in favor of Ben. Holladay and the receivers were discharged. On July 8, 1887, Ben. Holladay died, and on June 3, 1889, James Steel, his administrator, was made plaintiff.

The case was appealed to the supreme court, where the final de-

cree of this court was reversed, on the ground that the allega-
65 tions of the amended bill showed a waiver of the limitation as to the time of bringing the suit, and the case was sent back for further proceedings accordingly.

Here the defendant answered denying the alleged conduct and setting up the twelve months' limitation on the right to sue, to which the plaintiff replied.

The plaintiff took testimony in support of the amended bill.

The defendant took none, and the case was argued and submitted on the pleadings and evidence.

The case made in the amended bill on which the supreme court reversed the decree of this court is not supported by the proof. Mr. Thompson was examined as a witness, and he plainly admits that he was explicitly informed by the agent of the defendant, at least seven months before the expiration of the twelve months, that the defendant would not pay the claim. All negotiations on the subject ceased thereafter, and on being asked if he delayed bringing suit on account of the statement of the agent he answered, "I cannot say; I do not remember."

The contention of the plaintiff appears to be that if the receiver was delayed in bringing this suit, on account of the assurance that the matter would be settled, for however short a time, the twelve months' limitation is gone—waived—or can only be counted from the termination of such assurance.

But I do not so understand the law. The ruling of the supreme court in this case (136 U. S., 299) implies that if the conduct of the defendant prevented the plaintiff from bringing suit within twelve
66 months from the date of the fire, it cannot avail itself of such limitation; but suppose the plaintiff is only prevented by such means from bringing suit for three months after he was otherwise entitled to, cannot the defendant avail itself of the other seven months of the limitation? What was to hinder this suit being brought within this seven months? The parties might have agreed by the policy that this suit should be brought in six months after the date of the fire.

Reddesbarger *vs.* Hartford Ins. Co., 7 Wall., 389.
Davidson *vs.* Phœnix Ins. Co., 4 Saw., 494.
May on Ins., sec. 478.

If the conduct of the defendant only prevented this suit from being brought for five months after the date of the fire, it is only a waiver of so much of the limitation.

The question, then, is, Did there remain of the limitation a reasonable time within which to bring this suit? and this admits of but one answer: The time—seven months—was ample. Indeed, under the circumstances, one month was sufficient. The fact is, as the history of the case shows and the court knows, this suit was brought upon the theory that the ruling of this court in Spare *vs.* Home Mutual Ins. Co. (9 Saw., 142 17 F. R., 568); construing the phrase "after the loss occurs" as meaning after the loss was ascertained and payable and not the date of the fire. Accordingly, the original

bill contained no allegations tending to show a waiver of the limitation by the defendant.

67 But the court held that the time specified in the policy at which the limitation was to commence to run—the date of the fire—was not ambiguous, and must be taken to have effect as it read.

Thereupon the amended bill was filed, in which the attempt was made to avoid the difficulty by setting up a waiver of the limitation, alleging, among other things, that the receiver was delayed for "some time," whatever that may mean, in bringing his suit by assurances from the defendant that the matter would be settled.

More than this, the records of the court show that the receiver brought a similar suit to reform and enforce this policy on October 21, 1884, just five months and two days from the date of the fire. On June 24, 1885, a demurrer was sustained to the bill because it did not appear therefrom that the court appointing the receiver had authorized the suit to be brought, and on July 10, 1885, he dismissed that suit and brought the present one, in which such authority is alleged.

Of course, in the face of these facts there could not be any truth in the allegations of the amended bill as to the cause of the delay in bringing this suit.

The statements in the bill on this subject, which are denied by the answer, seem to have been the work of the attorney, which the receiver in his testimony utterly fails to support.

For instance, it is alleged in the amended bill that the agent "demanded" the payment of the premium; that the agent was authorized to assure the plaintiff that the sum would be paid, and that he delayed bring this suit on account of such assurance;

68 but the testimony of Mr. Thompson is that the agent said it would facilitate the settlement if it were paid, and the plaintiff paid it. Besides, the premium was due and should have been paid on the delivery of the policy whether the insurance was in favor of Kearney alone or he and his successors or whether the loss occurred during his receivership or that of Mr. Thompson. He also testifies that while the agent said he thought the company would pay the amount he was not authorized to say, and in reply to the question, "Did you delay bringing a suit in consequence of the statement made to you by the agent?" answered, "I cannot now say; I do not remember;" and also that he learned definitely from the defendant within one, two, or three months after the expiration of the sixty days that it would not pay the demand.

There was no waiver to the twelve months' limitation by the defendant, nor did the plaintiff ever so regard its contract.

The only other question in the case is, When does the twelve months' limitation commence to run, from the date of the fire or from the the expiration of sixty days after proofs of loss were furnished?

Numerous authorities *pro* and *con.* have been produced on the question when the limitation commences in case the action is required to be brought within twelve months or other certain period

from the time "the loss occurs," and I still think, as I said in Spare *v.* Home Mutual Ins. Co. (9 Saw., 145), that the weight of authority is in favor of the conclusion that the "loss occurs" not at the date of the fire, but thereafter, when the same is ascertained and established.

69 This construction of the phrase naturally led the insurance companies to the use of language in naming the date or event from which the limitation should commence, which would not admit of doubt as to its meaning: "Twelve months next after the date of the fire from which the loss shall occur" was substituted for "twelve months next after the loss shall occur."

No case has been found that gives any but a literal construction to the words "date of the fire," and, in my judgment, none will be.

On this point I am constrained to follow my judgment given in this case (11 Saw., 276), when I first heard it. It is then said: "It is well established that a stipulation limiting the time within which an action may be brought on a policy of insurance is valid and binding on the parties thereto, but that if it is ambiguous, either in itself or taken in connection with other provisions or stipulations in the policy, the ambiguity must be resolved in favor of the assured. See Spare *vs.* Home Mutual Ins. Co., 9 Saw., 145, and cases there cited." "The stipulation for limitation in this policy is, considered by itself, plain and susceptible of but one meaning; and, putting aside the provision concerning an award as inapplicable in this instance, there is nothing in the policy to qualify or render it doubtful."

On this view of the case there is no need to consider the question of reforming the policy. For, as was said in this case (11 Saw., 270), "The court will not reform an instrument merely for the sake of reforming it, but only to enable a party to assert some right thereunder;" and this statement is endorsed by Mr. Justice Har-

70 lan in his opinion in this case (136 U. S., 296); also Mr. Justice Field, in Davidson *vs.* Phœnix Ins. Co. (4 Saw., 594), said the same thing.

On the argument counsel for the plaintiff contended that "this is not a suit upon the policy, but a suit to enforce a specific performance of the contract between the parties," citing Hay *vs.* Star Fire Ins. Co. (77 N. Y., 235).

In that case there was a clause in the policy limiting the time within which a suit might be brought to enforce the same. This clause was alleged to have been inserted in the policy by fraud or mistake, and the object of the suit was to have it stricken out or to compel the defendant to give a policy without such clause, according to the agreement of the parties. The answer was that the suit was barred by lapse of time. The court very properly held that the disputed limitation did not apply, saying that this suit was "to compel the defendant to give a policy according to the agreement of the parties."

Where that policy was reformed by striking out the special limitation a suit could be brought to enforce it if brought within the period prescribed by the general statute of limitations; but in this,

assuming that the court would decree a reformation of the policy, still it could not be enforced on account of the special limitation therein. The court will not reform a policy merely for the sake of reforming when no action can be maintained on it when reformed.

There is no analogy between the two cases.

The bill must be dismissed, and it is so ordered.

Mr. George H. Williams, for the plaintiff.

71 Mr. L. B. Cox and Mr. W. S. Goodfellow, for the defendant.

(Signed) MATTHEW P. DEADY,
U. S. District Judge.

Endorsed: Filed October 19, 1891. R. H. Lamson, clerk.

In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator with the Will Annexed of the Estate of Ben. Holladay, Deceased, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, Defendant.

The above-named complainant, James Steel, administrator with the will annexed of the estate of Ben. Holladay, deceased, hereby appeals from the order and decree entered in said court and cause on the 19th day of October, 1891, to the United States circuit court of appeals for the ninth circuit, and prays that this his appeal may be allowed and that a transcript of the record and proceed-

72 ings and papers upon which said order and decree *was* made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

WILLIAMS & WOOD,
Solicitors for Complainant and Appellant, James Steel, Administrator with the Will Annexed of the Estate of Ben. Holladay, Deceased.

DISTRICT OF OREGON:

The foregoing appeal is allowed.

DEADY, *J.*

Due service of the within appeal by certified copy, as prescribed by law, is hereby admitted at Porland, Oregon, February 19, 1892.

COX, TEAL & MINOR,
Attorneys for Appellee.

Endorsed: Filed February 19, 1892. R. H. Lamson, clerk.

73 In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator with the Will Annexed of the Estate of Ben. Holladay, Deceased, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, Defendant.

Know all men by these presents that we, James Steel, administrator with the will annexed of the estate of Ben. Holladay, deceased, as principal, and I. A. Macrum, as surety, are held and firmly bound unto the Phœnix Insurance Company of Brooklyn in the sum of two hundred and fifty dollars, to be paid to said Phœnix Insurance Company of Brooklyn or its successors, executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated February 19th, 1892.

Whereas the above-named James Steel, administrator with the will annexed of the estate of Ben. Holladay, deceased, has appealed to the United States circuit court of appeals for the ninth circuit to reverse the decree in the above-entitled cause by the circuit court of the United States for the district of Oregon:

74 Now, therefore, the condition of this obligation is such that if the above-named James Steel, administrator with the will annexed of the estate of Ben. Holladay, deceased, shall prosecute said appeal to effect and answer all costs and damages if he shall fail to make good his plea, then his obligation shall be void; otherwise to remain in full force and virtue.

JAMES STEEL,
Administrator with the Will Annexed of the Estate of Ben. Holladay, Deceased.
I. A. MACRUM.

Signed, sealed, and delivered in the presence of—
H. F. McELROY.
LAURA FRIENDLY.

UNITED STATES OF AMERICA, *District of Oregon*, } *ss:*

I, I. A. Macrum, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said district, and that I am worth in property situated therein the sum of five hundred dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

I. A. MACRUM.

Subscribed and sworn to before me this 19th day of February, 1892.

[SEAL.]

H. F. McELROY,
Notary Public for Oregon.

75 Endorsed: Filed Feb. 19, 1892. R. H. Lamson, clerk.

Approved.

DEADY, *J.*

In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator with the Will Annexed of the Estate of Ben. Holladay, Deceased, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, Defendant.

Assignment of Errors.

The above-named complainant, having appealed from the proceedings and decree of the above-entitled court in said cause to the United States circuit court of appeals for the ninth circuit, assigns the following as errors in said proceedings and decree:

1. Said circuit court of the United States for the district of Oregon erred in not holding and deciding that the policy of insurance, a copy of which is attached to the bill of complaint herein, should be reformed so as to show that the loss, if any, was to be
76 payable to E. S. Kearney or his successors in office as receiver instead of being payable to said Kearney, his executors, administrators, and assigns.

2. Said court erred in not holding and deciding that the policy of insurance described in the pleadings herein should be reformed as prayed for in complainant's bill of complaint.

3. Said court erred in not holding and deciding that the bar of one year mentioned in the policy of insurance in controversy herein commenced to run at the expiration of sixty days from the date of the fire described in the bill of complaint.

4. Said court erred in holding and deciding that the twelve months' limitation in the policy of fire insurance hereinbefore mentioned within which the assured must sue for loss thereunder is not waived by conduct of the insurance company calculated to make the assured believe that the loss will be paid provided such conduct ceases so as to leave a reasonable time within which to sue.

5. Said court erred in holding and deciding that seven months of the twelve is considered ample time in which to bring a suit under the circumstances set out in the next preceding assignment of error.

6. Said court erred in holding and deciding that a limitation of twelve months from the date of the fire within which to sue on a policy of fire insurance commences to run from such date.

7. Said court erred in not holding and deciding that the limitation of one year commenced to run at the expiration of the time during which the receiver, D. P. Thompson, was delayed in
77 bringing suit by the declarations and acts of the insurance company inducing him to believe that a suit to enforce the payment of the loss was unnecessary.

8. Said court erred in not holding and deciding that the defend-

ant insurance company was estopped by its declarations and acts from claiming a forfeiture of the right to recover in this suit under its policy of insurance.

9. Said court erred in not holding and deciding that, as this is a suit to reform a policy of insurance, the bar of one year specified in such policy did not apply and was not available for the defendant in this suit.

10. Said court erred in dismissing the bill of complaint herein and entering a decree for the defendant.

WILLIAMS & WOOD,
Attorneys for Complainant and Appellant.

Due service of the within assignment of errors by certified copy, as required by law, is hereby admitted at Portland, Oregon, February 19, 1892.

COX, TEAL & MINOR,
Attorneys for Appellee.

Endorsed: Filed February 19, 1892. R. H. Lamson, clerk.

78 In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator of the Estate of Ben. Holladay, Deceased, with the Will Annexed, Plaintiff,
vs.
PHŒNIX INSURANCE COMPANY, Defendant. } No. 1150.

George H. Williams appearing for the complainant.
L. B. Cox appearing for the defendant.

The parties appear- before the examiner, by consent, on the 28th day of April, 1891, at 10 o'clock a. m., to take testimony herein; whereupon the following proceedings were had, to wit:

EDWARD S. KEARNEY is called and duly sworn as a witness in behalf of the complainant, and testifies as follows on direct examination:

Questions by Judge WILLIAMS:

My name is Edward S. Kearney; am about 60 years of age; my residence is Portland.

Q. You were at one time receiver in the suit of Holladay *vs.* Holladay, were you?

A. I was.

Q. Do you remember between what dates you were such receiver?

A. I was appointed, as nearly as I remember, in November, and I resigned, I think, in May—appointed in November, 1883, and resigned in May, 1884.

79 Q. While you were such receiver state if you effected an insurance upon the property commonly called the Clarendon hotel and the furniture in that hotel.

A. I did.

Q. Do you remember about the date when you obtained that insurance?

A. I really could not say. It was shortly after I was appointed receiver, but I do not remember the day; I think it was in December; I know they claimed the insurance was about out shortly after I was appointed, and I felt like securing the property against loss by fire and had it insured.

Q. With whom did you negotiate for that insurance?

A. Do not remember the man's name. He came into the marshal's office—I was then United States marshal—and he was very anxious to get the insurance; he was a heavy-set man, I think of Semitic or Hebrew origin; he looked to me like one of those people; he was very anxions to effect the insurance, and I had it renewed, I think, in the same company.

Q. You do not remember his name?

A. No; I cannot recall his name.

Q. You say he applied to you to insure that property in his company?

A. Yes, sir; he came up to the marshal's office.

Q. Did he represent or claim to represent the Phœnix Insurance Company of Brooklyn as agent.

A. Yes; he pretended to be, I guess likely, the street agent; I do not think he had an office or direct appointment; I want
80 to say this as accurately as I can. It was a company down on Front street that pretended to be the head office, and I took him to be an outside man to get insurance, and they issued the policy; but I do not remember the man's name.

Q. What representations, if any, did you make to the agent or agents of the insurance company as to the ownership of that property at the time you obtained the policy—negotiated for the policy?

Counsel for defendant objects to these representations during the process of the negotiations as immaterial.

A. Well, I had it insured as the Holladay property, of course; it was not my own property; everybody knew that; Holladay built the hotel; it was his property; I told him how I wanted it, of course—the loss, if any, to inure to the estate; it was not property of mine personally.

Q. You had no personal interest in the property that was insured?

A. Not any.

Q. You insured it as the receiver in the suit of Holladay *vs.* Holladay, did you?

Objected to as incompetent and not the best evidence.

A. I insured it for the Holladay estate—for the loss, if any, to be paid to the Holladay estate.

Q. Was it understood between you and the agent that the policy should cover the interest you represented in the suit of Holladay *vs.* Holladay?

Objected to as leading and incompetent.

A. Certainly; it was property in my hands belonging to the Holladays; each brother claimed it.

81 Q. This policy provides that E. S. Kearney, receiver for the suit of Holladay *vs.* Holladay, is insured, and that the company agrees to make unto the said assured, their executors, administrators, and assigns, all loss and damage that may accrue. Was it the understanding that in case you should cease to be the receiver the money should be paid to your executors, administrators, or assigns? Was there an understanding of that kind?

Objected to as immaterial and incompetent and that the question is leading.

A. No; that was in case I went out, for I spoke of resigning immediately after I went in; every one knows that; whoever followed me, of course. All there is there they wrote themselves. They had full knowledge whose property it was; they knew all about that. I showed that to Fechheimer, and he said that was right enough. I explained to him then about that administrator business; that it was not for me; it was not my property; it belonged to the Holladay estate. I took the receivership against my own will and got out of it as quick as I could.

Q. By whom was this policy prepared?

A. It was prepared down in the insurance office.

Q. And delivered to you?

A. Certainly it was. I was to have sixty days to pay the money in. They did all the writing themselves.

Cross-examination.

Questions by Mr. Cox:

—. From whom did you get the policy, Mr. Kearney; do you remember?

82 A. I cannot call the man's name, as I said before. He came into the office—a heavy-set man—and I think he was a Hebrew. I took him to be a kind of outside agent of the appointed agent down on Front street.

Q. Was he the same man who solicited the insurance in the first place?

A. Yes; he was the man that came and solicited it for that company. It was already insured in that office, and they wanted to insure it. I wanted it insured because Joseph Holladay had had it insured.

Q. I understand you represented only an undivided half interest in the property?

A. I represented the whole property; I could not have done otherwise.

Q. Did not Mr. Koehler and Mr. Dolph own one-half of the property?

A. No, sir; they did not own one cent in it.

Q. Then you undertook to insure the whole interest to the extent of the amount specified in this policy?

A. The alleged estate of what they owned in that property; yes.

Q. How does this policy happen to read, then, "four thousand dollars on their one-half interest in the four-story frame building and one thousand dollars on their one-half interest in the hotel furniture"?

A. Well, you say Koehler and Dolph. I will correct my statement. If they owned it I do not remember it. It is possible that they may have had an interest in it. It is seven years ago nearly, and I have had nothing to do with it since, and I have not stored my mind with that.

83 Q. This policy is probably correct, is it not, that you only insured a half interest instead of a whole interest?

A. Well, I do not like to say as to that, for I really could not. It requires me to think. In regard to Dolph and Koehler I believe they did get an interest in the ground, but I do not remember that they had an interest in the hotel; I do not remember it; but my object was to insure the Holladay interest in the property, as I would your house if you owned one and saw fit to trust me to look after it.

Q. Then you are not able to say whether this policy correctly sets forth the interest you undertook to insure in the property or not?

A. Well, I say emphatically that I do not remem- that Joe Dolph had anything to do with it at that time. I don't say he did not, but I do not remember his having any interest in it. Do not misunderstand me. I do not contradict it; I simply say that I do not remember that he had.

Q. Did you have any talk with the agents who wrote that policy at the time it was written or at any time afterwards before the fire took place?

A. Well, I do not remember that I did; I do not say I did or did not; I do not remember.

Q. You do not call to mind any conversation of that sort?

A. No, sir; I do not.

Q. Did you make any objection to the policy as it was written when it was delivered to you?

A. Well, I showed it to Fechheimer and he seemed to think it was right; he was the attorney that the court appointed to look after the business.

84 Q. Acting as your advisor in the receivership?

A. Yes, sir; he did not charge for that particular item, but he got a salary, and in attending to any case, of course, the court would allow him a fee.

Q. Then you and your counsel retained the policy as it was delivered to you without objection on your part?

A. Well, he handed it back to me after looking at it. I did not pretend to be a lawyer at all.

Q. You kept it ever since?

A. No, sir; I have not; this is the first time I have seen it for seven years, to my recollection.

Q. How long did you keep it?

A. Oh, I was in office as receiver about five months; something like five or six.

Q. And you turned it over to your successor when you left there?

A. Yes, sir.

Q. Then the fact is that from the time this policy was delivered to you until you turned it over to your successor in the receivership by order of the court the policy was kept in your possession without objection to its form on your part?

A. I think that is correct. I do not think I made any, sir. I took it down to Mr. Fechheimer, who was my legal counsel, as I would to yourself, if I had employed you, and I would expect you would inform me on that point.

Excused.

Attest: GEORGE H. DURHAM, *Examiner.*

85 PETER OUTCALT sworn on part of complainant.

Direct examination.

Questions by Judge WILLIAMS:

My name is Peter Outcalt; age, 42; residence, Portland; fire insurance is my occupation.

Q. How long have you been engaged in the insurance business and where?

A. All told, twenty-four years, the earlier period, between four and five years, of which was in the east, in Cincinnati, and the balance of the time on the Pacific coast; San Francisco and later in Portland.

Q. Have you had experience in writing up policies of insurance of different kinds and descriptions?

A. Oh, a very varied experience; a very extensive one.

Q. What is the usual custom of insurance companies when they insure property in the hands of a receiver or trustee or any other person who has no personal interest or holds the property in an official capacity as to insuring their executors, administrators, or successors in office, or as to persons who may become entitled to the insurance? State the general custom, if you know it, on that subject.

Objected to by defendant as immaterial and not within the issues presented by the pleadings.

A. With respect to the relations between the parties—that is to say, between the executive or official to whom you allude and the insurance company?

Q. Yes.

86 A. Well, the general view entertained by insurance companies so insuring is to regard the estate as that property entitled to indemnification in event of loss. The receiver or agent is, as a rule, regarded purely as a designative title, and it is not understood that when indemnity is paid under a policy that the receiver is other than the recipient of it. He is in no sense a beneficiary except in his executive capacity as administrator. Policies are issued to John Doe or Richard Roe (as the case may be), receiver, but it is purely a designative proposition as regards the estate and ones to whom indemnity will ultimately be granted.

Q. If you were to write a policy for a receiver who was insuring property in his official capacity, would you write it loss payable to him or his executors or his administrators or to him or his successors in office, or persons who might be concerned in the property?

Same objection.

A. The policy conditions, as a rule, have the stereotyped stipulation with respect to the payee or who shall be the payee. It is not uncommon with some companies, as in the case of insuring boards of trustees, to insert the loss payable clause in about the following manner: Loss, if any, payable to the board of trustees of this, that, or the other institution or their successors in office.

Cross-examination.

Questions by Mr. Cox:

Have you acted in a representative capacity for the Phœnix Insurance Company, of Brooklyn?

87 A. Never, sir.

Q. Do you know what the custom of that company is in the matters you have testified in regard to?

A. I am not personally familiar with the exceptional precise method employed by the Phœnix of Brooklyn. I only know that it, like most insurance companies, has, as to the printed conditions of their policies, the stereotyped form of policy. As to what they may, at their option, see fit to introduce into their contracts with a view of emphasizing their precision or what not I am not prepared to say. Every underwriter is at liberty to exercise his judgment in that regard. I am speaking now with respect to usage principally as regards this matter of trusteeship.

Q So far as your knowledge of that company's usage in doing business is concerned it is based upon printed forms of policies?

A. I could readily understand, from what I know as having been in contact with this business for a long time, that there could hardly be in this business of fire insurance as now prosecuted any very decided or marked disparity as between the usages of one company or another. The business is a competitive one, and companies aim in the prosecution of their business to exclude from their policy contracts all long stipulations, or whatever else may serve to put them at a disadvantage against their adversary.

Q. But that does not bring an answer to my question exactly.

A. I cannot answer your question. I cannot say that I am familiar specially with what the Phœnix Insurance Company may
88 have done in that regard. As to whether it has been exceptionally precise in the framing of its policy contracts I am not prepared to say. It is a fact, however.

Q. It is a fact, however, that all you know in regard to their customary manner of doing business is derived from an inspection of their printed forms of policies as you see them in use?

A. Well, no. My knowledge would not be limited to that. I have had some contact with the Phœnix Insurance Company of Brooklyn's practice and from the fact that my own company here—the Columbia—reinsures a very considerable interest with the Phœnix of Brooklyn, and as many, perhaps, as a thousand policies of that company passed through my hands which were, in the nature of things, the subject of examination by me.

Q. Then from the examination of these policies you reached the conclusion that you have just stated?

A. I would reach the conclusion that they were not specially different from other policies. I might say that some States—for example, the State of New York—has enacted laws which specially bear upon this question of construction of policy contracts as contradistinguished from some other States of the Union, and it is not admissible in the State of New York to be in line with the law that any policy contract different from that prescribed by the statute shall be used, but that applies solely to business in the State of New York itself. It has no effect or bearing at all upon what that company may do in Alabama, Georgia, or elsewhere.

Excused.

PETER OUTCALT.

89 Attest: GEO. H. DURHAM, *Examiner.*

Whereupon recess was now taken until 2 p. m.

D. P. THOMPSON sworn on the part of the plaintiff.

Direct examination.

Questions by Judge WILLIAMS:

My name is D. P. Thompson; age, 57; residence, Portland; occupation, banking.

Q. Were you at any time receiver in the suit of Holladay *v.* Holladay pending in the circuit court of Multnomah county?

A. I was.

Q. State if you were the successor of E. S. Kearney as receiver in that suit.

A. I was.

Q. Do you remember the date when you became receiver?

A. I think on the 19th day of May, 1884.

Q. When was the building destroyed by fire?

A. I cannot give the exact date, but it was about that date; within a few days of the 19th of May, 1884, either before or after.

Q. On the day upon which that property was destroyed by fire, had it been turned over to you by Kearney or was it still in his possession?

90 Objected to as incompetent.

A. I believe it was still in Kearney's possession.

Q. Can you state how long it was after you were appointed before the possession of the property which Kearney held as receiver was transferred to you?

Same objection.

A. No; I cannot; but it was not more than three or four days.

Q. Did this policy of insurance that was issued by the Phœnix Insurance Company upon the Clarendon hotel property come into your hands as receiver?

A. It did.

Q. Who delivered it to you?

A. E. S. Kearney, my predecessor, delivered it with other papers.

Q. Who paid the premium on the policy to the company?

A. I paid it after I became receiver.

Q. (Cross.) Was it before or after the fire?

A. It was after the fire.

Defendant moves to strike out the witness's answer as to the payment of the premium, on the ground that it is immaterial.

Q. How did you come to pay the premium? Was there anything said to you about it by the company or its agents?

Same objection.

A. The agent stated to me that the premium had not been paid; that it would facilitate settlement; that it was necessary that it should be paid before the settlement and I paid it.

91 Q. Out of what funds did you make that payment?

Same objections.

A. Out of the funds that came into my hands as belonging to the estate of Ben. and Joe Holladay.

Q. Has that payment made by you been approved by the court or was it approved by the court when you settled your account as receiver?

Same objections.

A. It was.

Q. State if you at any time after you became receiver expressed any determination to bring a suit against the company or threatened to bring a suit against the company.

A. I did, if the policy was not paid.

Q. Was there anything said to you at any time by the agents here

of the company about settling for the loss at or after the time you threatened to bring a suit against the company?

A. The agent offered to settle for one-half of the loss rather than have any suit about it—to pay one-half—which I refused to accept.

Q. Was there anything said by the agent to you with reference to the probabilities of a settlement by the company if a suit was not brought?

A. The agent told me he thought the company would pay the amount. He thought they would, but he was not authorized to say. He thought they would pay it and advised me not to bring suit; it would complicate matters somewhat, and he thought I had better not do it; urged on me not to do it.

92 Q. Was that after you had paid the premium or can you give the date of that conversation or of any such conversations you had with him?

A. It was very soon after the sixty days expired within which I had to do it, but I cannot give the date or time. I have no data, and it has been a good many years since.

Q. Did you delay bringing a suit in consequence of those statements made to you by the agent?

A. I cannot now say; I do not remember.

Q. Were you at any time informed or did you have any knowledge that the agent here had no power or right to receive the premium upon that policy?

A. Not to my recollection.

Q. Can you state about when it was that you were first informed that the company would not pay this loss?

A. I cannot give the date, but it was after the sixty days had expired in which to make the proofs, but I cannot give the time.

Q. Do you know who the agent was that was acting here at that time? Who took the premiums from you?

A. No; I cannot give his name.

Q. Did he know that you were the receiver in the case of Holladay *v.* Holladay?

Objected to as immaterial.

A. Oh, yes; he was treating with me as receiver.

93 Cross-examination.

Questions by Mr. Cox:

—. Mr. Thompson, what acts of delivery from Mr. Kearney to yourself took place in regard to this property?

A. By him furnishing me a list of the property and my accepting the lists after examining the property to see if I was obtaining the possession of it and giving him a receipt for it.

Q. And you do not remember just when that took place?

A. I cannot give the exact date, no; whether it was on the 19th or within a day or two after that; it was certainly within a day or two after that time, or two or three days. I have forgotten exactly.

Q. You say that you were notified that the company declined to pay this loss very shortly after the expiration of the sixty days from the time the loss occurred?

A. Well, I say soon after that; I cannot give the date or the time.

Q. But it was a short time?

A. Yes; it was not long after.

Q. And after receiving that notice you relied no further upon any expectation that the company would pay voluntarily?

A. No. They promised to refer the matter to the home office, and they were some time, as a matter of course, getting their answers from there; but I cannot give the length of time that they required.

94 Q. What is your best judgment now as to the time when you gave up any hope of negotiating with the company for a voluntary settlement?

A. I cannot give that time; it may have been one month, it may have been two, it may have been three months.

Q. From the date of the loss, you mean?

A. No; from the date of the sixty days.

Q. Do you recollect having a talk with Mr. Brown, of Brown, Craig & Co., of San Francisco, in regard to the matter?

A. Yes, sir.

Q. Was it from him you got this understanding?

A. That I cannot say, whether it was from him or the local agent here; but the local agent assured me that he would send all the facts to the head office, and I cannot say whether that was in the East or at San Francisco, but he would send all the facts to the office to which he was responsible and would give me their answer when he received it, which he did.

Q. Brown did notify you that the company would not pay the loss, did he not, in this conversation?

A. I believe he did; that is my recollection.

Excused.

D. P. THOMPSON.

Whereupon the plaintiff, with the reservation of hereafter offering some documentary evidence, rests.

GEO. H. DURHAM, *Examiner.*

95 DISTRICT OF OREGON, *ss:*

I, Geo. H. Durham, examiner of said court, do hereby certify that the testimony of the witnesses named in the foregoing record was taken before me at the time and place therein stated; that each of said witnesses before testifying was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that said testimony was then taken before me by a stenographer therefor duly sworn and the testimony then extended in long-hand and was then read to or by said witnesses and by them severally subscribed in my presence.

In witness whereof I have hereunto set my hand this 27th day of July, 1891.

GEO. H. DURHAM, *Examiner.*

COMPLAINANT'S EXHIBIT "A."

Be it remembered that — a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the third day of September, A. D. 1883, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court.

Present: Hon. Raleigh Stott, judge, presiding.

Whereupon on this Saturday, the 17th day of November, A. D. 1883, the same being the 63d judicial day of said term of said court, among other proceedings the following was had, to wit:

96 BEN. HOLLADAY, Plaintiff,
vs.
JOSEPH HOLLADAY, Defendant.

The above-entitled cause having been argued and submitted to the court upon the motion of the plaintiff for the appointment of a receiver, and the court having duly considered the matter, it is ordered that said motion of the plaintiff be, and is hereby, allowed and granted; and the plaintiff being present in person and by his attorney, Geo. H. Williams, and the defendant being present in person and by his attorney, Thomas N. Strong, and the court having heard the suggestions of counsel in relation to the appointment of said receiver and the amount of bond which ought to be given by him when appointed, it is ordered by the court that Edward S. Kearney be, and is hereby, appointed receiver of all the property, both real and personal, including all accounts, evidence of debts, books of accounts, records, letters, papers, in controversy between the plaintiff and defendant in this suit, and that the defendant surrender and deliver the possession of all said property, and particularly the following-described property or so much as he has in his possession or control or as may come to his possession or under his control, to said receiver, to wit:

1,050 shares of stock in the Oregon Transfer Company; 1,200 shares of stock in the Portland Street Railway Company; 5,334 shares of stock in the Willamette Real Estate Company; 10,000 shares of stock in the Oregon Real Estate Company; 675 shares of stock in the Willamette Steam Mills L. & M. Co., and
97 that the defendant transfer upon the proper books all the said stocks to said receiver, and all the furniture, fixtures, stores, wines, and provisions in the residence at the corner of Third and Stark streets, Portland, Oregon; all the furnitures, fixtures, household implements and utensils in the Seaside house, in Clatsop county, Oregon, and in the two cottages on the property where said house is located; horses, cows, and all the live stock, wagons and stable

furniture upon the aforesaid property in Clatsop county; one-half of the furniture in the Clarendon hotel, in the city of Portland, Oregon; one promissory note executed by Samuel M. Smith December 8, 1872, for -1,500 and interest; one promissory note executed by Samuel M. Smith to plaintiff, dated December 15, 1872, for $6,938.41, and the mortgages by which said notes are secured; one promissory note of Geo. E. Cole for about $8,000; the donation land claim of Thomas H. Hunsacker and wife, being claim No. 71, notification 5061, in Polk county, Oregon, and all the personal property connected therewith.

The donation land claim of Mrs. Elizabeth Lallie, being claim No. 37, notification No. 7864, in Clatsop county, Oregon; a tract of about 170 acres land in Clatsop county conveyed by William Lallie to the plaintiff on the 25th day of August, 1874; also certain parcels of land in Clatsop county, Oregon, containing about 296.38 acres, fully described in a deed dated December 29, 1875, made by the Oregon Real Estate Company to the defendant; also lots 1, 7, and 8, in block 47, in the city of Portland, Oregon; lot 6, in block 148, in the city of Portland; the undivided one-half of the south half of block 23, in Couch's addition to the city of Portland; lots 6,
98 7, and 8, in block 23, in Couch's addition to the city of Portland; block 52, in Holladay's addition to the city of East Portland; blocks 20 and 37, in Wheeler's addition to the city of East Portland; also blocks lettered L, M, N, I, J, K, and fractional blocks lettered P, C, D, G, H, and F, and also lots number 6, 7, and 8, in block 23, all in Couch's addition to the city of Portland; parts of the donation land claim of J. W. Linn and wife and B. L. Tucker and wife, containing in all about 665 acres, in Washington county, Oregon; a certain tract of timber land, containing about 407 acres, in Washington county, Oregon, and also all the dwelling-houses, buildings, and offices or places of business situated on the said lands above described.

And it is further ordered that the said receiver, before entering on the discharge of his duties as such receiver, shall execute and file with the clerk of this court an undertaking, with sureties to be approved by this court, in the sum of one hundred thousand dollars, conditioned for the faithful discharge of his duties as such receiver. It is further ordered that upon the filing of said undertaking the said receiver shall enter upon the discharge of his duty and take and manage the said property and retain the same until discharged by the court, and shall render to the court a monthly account of his doings in the premises and obey the orders of the court therein.

And it is further ordered that upon the qualifications of said receiver the said defendant shall cease to exercise any control over any of the said property or business except to transfer the same as aforesaid.

(Signed) RALEIGH STOTT, *Judge.*

99 STATE OF OREGON, } ss:
County of Multnomah, }

I, John R. Duff, clerk of the circuit court of the county of Multnomah and State of Oregon, do hereby certify that the foregoing copy of journal order has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original journal order as the same appears on file and of record at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 25th day of May, A. D. 1891.

[SEAL.]

JNO. R. DUFF,
Clerk of the Circuit Court,
By V. A. FRYER, *Deputy.*

COMPLAINANT'S EXHIBIT "B."

Be it remembered that at the regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland, in said county and State, on Monday, the fifth day of May, A. D. 1884, the same being the first Monday in the month and the time fixed by law for holding a regular term of said court.

Present: Hon. Seneca Smith, judge, presiding.

Whereupon on this Wednesday, the 14th day of May, A. D. 1884, the same being the ninth judicial day of said term of said court, among other proceedings the following was had, to wit:

100 BEN. HOLLADAY }
vs.
JOSEPH HOLLADAY. }

Now, at this time, come Williams, Hill, Durham and Thompson and Dolph, Bellinger, Mallory and Simon, attorneys for plaintiff, and T. N. and F. R. Strong, attorneys for defendant, and this cause comes on to be heard upon the matter of the appointment of a receiver; and this court having heretofore, on the 17th day of November, 1883, duly appointed E. S. Kearney receiver to take possession, control, and manage all and singular the property in said order so appointing said Kearney as aforesaid, particularly mentioned and referred to, and the said Kearney having thereafter duly filed his undertaking and taken the oath required by law as such receiver and entered upon the duties of such appointment, and the said E. S. Kearney having thereafter, on the — day of May, 1884, tendered to this court his resignation as such receiver in writing, which resignation is now hereby accepted, and the said parties hereto being unable to agree as to the appointment of a successor to the said Kearney as such receiver, and the court having fully considered the matter of such appointment and being ful-y advised in the premises, it is now hereby ordered that David P. Thompson, of Portland, Oregon, be, and he is hereby, appointed receiver in the place of the said

Kearney of all the property, both real and personal, in controversy between the parties hereto, which said property is particularly mentioned in the plaintiff's complaint herein and in the said order entered on the said 17th day of November, 1883, appointing said Kearney receiver as aforesaid, and the said
101 Kearney and the defendant herein are hereby directed to assign, transfer, and deliver over to said D. P. Thompson, as receiver as aforesaid, all and singular the property, real and personal, in controversy between the parties mentioned and described in said complaint and order, including all accounts, evidences of debt, books of accounts, records, certificates of stock, letters, and papers so in controversy as aforesaid; and it is further ordered that said David P. Thompson, before entering upon the discharge of his said duties as such receiver, shall execute and file with the clerk of this court an undertaking, with sureties to be approved by the court, in the sum of $100,000, conditioned for the faithful discharge of his duties as such receiver. It is further ordered that upon the filing of said undertaking and its approval as aforesaid the said receiver shall enter upon the discharge of his duties and take and manage the said properties and retain the same until discharged by the court, and shall render to the court a monthly report or account of his doings in the premises and obey the orders of the court therein; and it is further ordered that upon the qualification of the said receiver the said late receiver and the parties to this suit shall cease to exercise any control over any of said property business, except to transfer the same as aforesaid.

(Signed) SENECA SMITH, *Judge.*

102 STATE OF OREGON, }
County of Multnomah, } *ss:*

I, John R. Duff, clerk of the circuit court of the county of Multnomah and State of Oregon, do hereby certify that the foregoing copy of journal order has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original journal order as the same appears on file and of record at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 25th day of May, A. D. 1891.

[SEAL.] JOHN R. DUFF,
Clerk of the Circuit Court,
By V. A. FRYER, *Deputy.*

In the Circuit Court of the United States for the District of Oregon.

JAMES STEEL, Administrator of the Estate of Ben. Holladay, Deceased, Complainant,
vs.
THE PHŒNIX INSURANCE COMPANY, Defendant.

It is hereby stipulated between counsel for complainant and defendant in the above-entitled cause that the defendant may now, as

though it had been within the time prescribed for taking the defendant's proof, offer in evidence, subject to all legal objec-
103 tions to be taken at the argument, a copy of the undertaking of D. P. Thompson as receiver in the case of Holladay *vs.* Holladay, with the endorsements thereon, and it is conceded that said undertaking was duly filed May 19th, 1884; and also that it be admitted as a fact proved by evidence introduced by the defendant within said time, subject to said objections, that the fire by which the insured property in controversy in this suit was destroyed occurred on the night of May 19th, 1884.

And thereupon it is agreed that the taking of testimony in this cause be concluded and the same be reported to the court.

July 22d, 1891.

WILLIAMS & WOOD,
Attorneys for Complainant.
COX, TEAL & MINOR,
Of Solicitors for Defendant.

DEFENDANT'S EXHIBIT 1.

In the Circuit Court of the State of Oregon for the County of Multnoma.

BEN. HOLLADAY
vs.
JOE HOLLADAY *et al.*

Whereas on the 14th day of May, 1884, the court above named duly made an order in the above-entitled cause appointing
104 D. P. Thompson a receiver therein; and whereas the said court fixed the amount of the undertaking of the said receiver at the sum of one hundred thousand dollars:

Now, therefore, we, D. P. Thompson, as principal, and Frank Dekum and J. W. Brazee, sureties, hereby undertake in the sum of one hundred thousand dollars that the said D. P. Thompson will well and truly discharge the duties of receiver, and that he will safely keep and honestly account for all property of every name and nature which may come into his possession by reason of his said office according to law and the order of this court.

Witness our hands and seals the 19th day of May, 1884.

D. P. THOMPSON, *Principal.* [SEAL.]
FRANK DEKUM, *Surety.* [SEAL.]
J. W. BRAZEE, *Surety* [SEAL.]

STATE OF OREGON, } *ss:*
County of Multnomah, }

I, Frank Dekum, and I, J. W. Brazee, being duly sworn, say that I am a citizen of the State of Oregon; that I am an inhabitant of and a householder within Multnomah county, and that I am worth

the sum of one hundred thousand dollars over and above my just debts and liabilities, exclusive of property exempt from execution.

FRANK DEKUM,
J. W. BRAZEE.

105 Subscribed and sworn to before me the 19th day of May, 1884.

R. L. DURHAM,
Notary Public for Oregon.

The foregoing undertaking is hereby approved this — day of May, 1884.

—— ——, *Judge.*

Endorsed: Approved this 18th day of May, 1884. Seneca Smith, judge.

Filed May 19th, 1884.

WM. R. SEWALL, *Clerk*,
By W. H. WOOD, *Deputy.*

STATE OF OREGON, *County of Multnomah,* } ss:

I, John Duff, clerk of the circuit court of the county of Multnomah and State of Oregon, do hereby certify that the foregoing copy of bond, etc., with the endorsement thereon has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original bond, etc., with the endorsements thereon, as the same appears on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 21st day of July, A. D. 1891.

[SEAL.]

JNO. R. DUFF,
Clerk of the Circuit Court,
By I. G. SCOTT, *Deputy.*

Testimony endorsed: Filed July 29, 1891. R. H. Lamson, clerk.

106 UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing pages numbered 1 to 173, inclusive, contain a full, true, and complete transcript of the records and proceedings had in said court in the cause of James Steel, administrator of the estate of Ben. Holladay, deceased, against The Phœnix Insurance Company, as the same now appears of record in my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Portland, in said district, this Feb-

ruary twenty-ninth, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.] R. H. LAMSON, *Clerk*,
By R. B. LAMSON, *Deputy Clerk*.

107 In the United States Circuit Court of Appeals, Ninth Circuit.

JAMES STEEL, Adm. of Estate of *D*en. Holladay, Dec'd, Appellant,
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN, Appellee.
} Filed July 18, 1892.

Appeal from the U. S. circuit court for the district of Oregon.

Williams & Wood, for appellant; Cox, Teal & Minor and W. S. Goodfellow, for appellee.

Before McKenna & Gilbert, circuit judges, and Hawley, district judge.

108 HAWLEY, *J.*:

On the 21st day of April, 1884, the Phenix Insurance Company of Brooklyn, in consideration of three hundred dollars, subject to the terms and conditions expressed in a policy of insurance, insured "E. S. Kearney, receiver for Holladay *v.* Holladay, against loss or damages by fire to the amount of five thousand dollars as follows: $4,000 on their one-half interest in the four-story frame building occupied as a hotel and known as the Clarendon hotel, * * * Portland, Oregon; $1,000 on their one-half interest in the hotel furniture while contained therein to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured * * * as shall happen by fire to the property so specified from the 27th day of April, 1884, at 12 o'clock at noon, to the 27th day of April, 1885, at 12 o'clock at noon, the amount of loss or damage * * * to be paid sixty days after the proofs of the same required by the company shall have been made by the assured and received at the office in Chicago." This policy contained 13 specific conditions, beside several notes and paragraphs. The 10th provided for the selection of arbitrators in the event the amount of the loss could not be determined by mutual agreement. The 13th reads as follows: "13. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of fire from which such
109 loss shall occur; and should any suit or action be commenced against this company after the expiration of the

aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim *and* statute of limitation to the contrary notwithstanding."

At the time of the execution and the delivery of this policy the insurance company well knew that the title to said property was in dispute in the suit of Holladay *vs.* Holladay, and that said Kearney was in possession of the property merely as the receiver in said suit and had no interest therein of any nature except as such receiver.

On May 14th, 1884, an order was made in said suit accepting the resignation of said Kearney as receiver and appointing D. P. Thompson as receiver in his stead. On the 19th of May, 1884, the said Thompson duly qualified as such receiver, and thereafter, on the night of the same day, the said insured property, without any fault, failure, neglect, or omission on the part of said Kearney, Thompson, or of any other person, was totally destroyed by fire, and a loss was sustained in a sum greater than the amounts specified in the policy.

This suit was commenced on the 10th day of July, 1885, 13 months and 21 days after the fire, by Thompson, as the successor of Kearney in the receivership, to reform the policy so as to be made payable to the receiver and his successors in office, for the benefit of whom it might concern, and for a decree to recover the amount due upon said policy.

A demurrer to the original bill was sustained on the ground that the plaintiff's right of action was barred because the suit was not commenced "within 12 months next after the date of the fire
110 from which the loss occurred." (Thompson *vs.* Phenix Ins. Co., 25 Fed. Rep., 296.)

An amended bill was thereafter filed alleging conduct on the part of the insurance company which, it was claimed, amounted to a waiver of the limitation of time for the commencement of the suit. A demurrer to this bill was also sustained and the suit dismissed. From that decree an appeal was taken to the Supreme Court of the United States, and the decree was reversed upon the ground that the allegations of the amended bill showed a waiver of the limitation as to the time of bringing the suit.

Thompson *vs.* Phenix Co., 139 U. S., 299.

On July 12th, 1886, Thompson was removed from the receivership and G. W. Widler and Joseph Holladay were appointed in his place. Thereafter the suit of Holladay *vs.* Holladay was decided in favor of Ben. Holladay and the receivers were discharged. On July 8th, 1887, Ben. Holladay died, and on June 3rd, 1889, James Steel, his administrator, was made plaintiff in this suit. Thereafter this suit was again tried, and the court held that the allegations of the amended bill were not sustained by the evidence and dismissed the suit. (Steel *vs.* Phenix Ins. Co., 47 Fed. Rep., 863.) From this decree the present appeal is taken.

1. Can the policy be reformed?

The right of plaintiff to have the policy reformed, if the action can be maintained after it is reformed, so as to be made payable to

the receiver or his successor in office, and thereby conform to the intention of the parties—if any reformation in that respect is necessary—is by the admissions in the answer and proofs upon the
111 trial rendered too clear for any discussion upon the subject.

It is, however, proper to state in this connection that we are of opinion that the intent of the parties appears upon the face of the policy itself, and that no reformation is required in order to enable plaintiff to maintain the suit as a representative of the interest of Holladay in said property.

2. Are the allegations of the amended bill as to the conduct of the insurance company in delaying the commencement of the suit sustained by the evidence? These allegations are, in substance, that the insurance company, by its duly authorized agents, assured the plaintiff, about thirty days after the fire and after the acceptance of the proofs of loss, that no question was made as to the loss or its payment except that the company was considering the fact of the change in the receivership, and that it would undoubtedly pay the loss claimed; that as late as June 27th, 1884, the premium of three hundred dollars was paid to the company, which by its agents again assured the plaintiff that the loss would be paid as soon as action could be taken; that after sixty days had elapsed from the delivery of the proofs of loss the company, by its agents, repeatedly gave the same assurances, and that by reason of such promises and assurances the plaintiff neglected "for some time after sixty days from the delivery of the proofs of loss to bring suit for the recovery of the loss sustained." The testimony in support of these allegations is very brief.

It is admitted that the payment of the premium of three hundred dollars was made on the 27th of June, 1884, as alleged in the bill. Thompson testified that the agent of the company stated to
112 him "that the premium had not been paid, and that it would facilitate settlement;" that he paid it; that he threatened to bring suit against the company if the loss was not paid; that the agent offered to settle by paying one-half of the amount specified in the policy rather than have any suit about it; that he refused to accept this offer; that the agent then told him "that he thought that the company would pay the amount; he thought they would, but he was not authorized to say; he thought they would pay it and advised me not to bring a suit; it would complicate matters somewhat, and he thought I had better not do it; urged me not to do it;" that this was very soon after the sixty days expired. "I cannot give the date or time; I have no date, and it has been a good many years since." That he was first informed that the company would not pay the loss after the sixty days had expired in which to make the proofs; that after this the agent of the company promised to refer the matter to the home office, and they were some time, as a matter of course, getting their answer from them; that he could not give the exact time when he gave up any hope of negotiating with the company for a voluntary settlement; that it may have been one month, it may have been two, or it might have been three months from the expiration of the sixty days. The answer of

the company alleges that notice was given to Thompson on the 31st day of August, 1884, "that the defendant denied any liability upon said policy and did refuse and would at all times refuse to pay said loss."

The insurance company rely upon an answer given by Thompson to a question propounded to him to show that there was no delay in bringing the suit which was caused by any conduct upon the part of the company. The question and answer *is* as follows: "Q. Did you delay bringing a suit in consequence of those state-
113 ments made to you by the agent? A. I cannot say now; I do not remember."

This answer of the witness must be taken with reference to the other portions of his testimony which stated the facts, showing beyond any controversy that the bringing of the suit was delayed for one, two, or three months—some time after the expiration of the sixty days.

The supreme court, in deciding that the allegations in the amended bill were sufficient, said:

"If, as the allegations of the amended bill imply, the failure of the plaintiff to sue within the time prescribed by the policy, computing the time from the date of the fire, was due to the conduct of the company, it cannot avail itself of the limitation of twelve months. Curtis *vs.* Home Ins. Co., 1 Biss., 484, 487; Ide *vs.* Phœnix Ins. Co., 2 Biss., 333; Grant *vs.* Lexington Ins. Co., 5 Ind., 23, 25; Mickey *vs.* Burlington Ins. Co., 35 Iowa, 174, 180. In the case last cited it was properly said that it would be contrary to justice for the insurance company to hold out the hope of an amicable adjustment of the loss and thus delay the action of the insured, and then be permitted to plead this very delay, caused by its course of conduct, as a defense to the action when brought."

The following authorities are to the same effect:

Ames *vs.* Ins. Co., 14 N. Y., 264; Killips *v.* Putnam Fire Ins. Co., 28 Wis., 483; Insurance Co. *v.* Brodie, 52 Ark., 11; St. Paul Fire & M. Ins. Co. *v.* McGregor, 63 Tex., 404.

In the Texas case the court said:

"If the course of conduct pursued by the appellant was such as to induce the appellee to believe that the loss would be
114 adjusted and paid without suit, and for this reason suit was not brought within the time prescribed, then, under the well-settled principles applicable to such cases, this action may be maintained on the policy even after the expiration of the time therein prescribed."

The views expressed by the Supreme Court of the United States are as applicable to the evidence in this case as to the allegations of the bill. The most that was claimed in the bill was that by the conduct of the insurance company the plaintiff was delayed in bringing the suit for some time after sixty days from the delivery of the proofs of loss, and this is shown by the evidence.

3. The contention of the insurance company is that its conduct, in any event, only prevented this suit from being brought for five months after the fire, and that this only amounted to a waiver of so

much of the limitation, and that, as there still remained seven months—a reasonable time—within which to bring suit, the action is barred because not brought "within twelve months next after the date of the fire." Is this contention sound?

Is it supported by any substantial reason?

When does the twelve months' limitation commence to run?

Is it from the date of the fire or from the expiration of sixty days after the proofs of loss were furnished?

Numerous and respectable authorities can be found in support of either view, and, inasmuch as they are in direct conflict, it becomes the duty of this court, upon the first presentation of the question, to determine which view is sustained by the weight of reason and ought in justice to be followed.

In several of the authorities where these questions have
115 been discussed the policies of insurance provided that no suit could be sustained unless brought within six or twelve months "after the loss shall have occurred" instead of "after the fire," and some of the cases intimated that the language should be construed differently. We are, however, of opinion that there is no real or substantial difference in principle between the meaning of the words "loss" or "fire" as used in the policies. The loss occurrs at the time of the fire.

If the provision in the policy is to be construed solely with reference to the language of the clause in which the limitation is expressed, independent of any other fact or condition expressed in other clauses of the policy, then, of course, the suit cannot be maintained unless brought "within twelve months next after the date of the fire from which such loss shall occur."

It is the duty of courts, however, to arrive at the intention of the parties by an examination and consideration of the entire instrument, its various clauses and conditions, and the objects and purposes which the parties had in view at the time of the execution, acceptance, and delivery of the policy.

In determining the intention of the parties it is our duty to examine the whole instrument in order to ascertain, if possible, the true meaning of clauses which in a certain light might be deemed contradictory, and to gather from the various clauses the real object and purpose which the parties intended by the instrument as a whole. When this is ascertained, then the language of the clause in controversy must be so interpreted as to give full force and effect to the true intention of the instrument as a whole.

With these general rules applicable to the construction of
all written instruments, whether it be a deed, contract, *of*
116 policy of insurance, we shall proceed to an examination and review of certain other conditions in the policy.

After the fire the insured is required to give notice of any loss and to make the necessary and satisfactory proofs thereof, and the company is allowed sixty days after such proofs have been received at the home office in Chicago to pay the amount of loss or damage sustained. Under this clause no suit could *no* commenced until after sixty days at least from the time of the fire. This would leave

only ten months instead of twelve months within which time suit could be commenced.

In the 13th condition, the one wherein suit is allowed to be brought "within twelve months next after the fire," is an express proviso that no suit against the company shall be maintained in any court "until after an award shall have been obtained fixing the amount of such claim." As there has been no award in this case, it follows that, if the award clause is to be considered of full force and effect and construed solely with reference to the language used in this particular clause, then the remaining ten months has expired, and by the literal interpretation of independent clauses, which of themselves are plain, clear, and unambiguous, it actually happens in the case that the right of action was barred before it accrued under other provisions, and this condition of affairs is accomplished without any act, fault, or negligence on the part of the insured. This of itself justifies us in going beyond the mere words of any particular clause in order to ascertain the meaning of the clause and the intention of the parties.

The insurance company, it is true, does not rely upon the
117 award clause, and we refer to it simply to illustrate the weakness of its contention that another clause, upon which it does rely, shou-d be literally construed because the language used therein is clear, plain, and unambiguous.

The company might have claimed that, according to the award clause, the suit was brought too soon; but such acontention would be manifesty absurd. Why? Because it is evident that the parties never intended that such a result should be accomplished under the facts in this case.

This is made perfectly clear by a reference to the other provisions in the policy to the effect that the amount of the loss or damage might be determined by mutual agreement between the parties, and in the event of their failing to agree, then arbitrators might be chosen; and it appearing that the company, after five months of occasional promises to pay, finally decided that it would not pay the loss, this conduct was, of course, a waiver of the right to rely upon the award clause. Upon like reasoning, why should not their conduct in causing a delay of time in the bringing of the suit, when suit was threatened, be a waiver of the time in the limitation clause?

A policy of insurance which contains conditions reducing the statutory time for the commencement of any suit thereon ought in justice and equity to be so construed, if reasonable under all its terms, as to give the full period of time mentioned in the policy, freed from the provisions of all other clauses of the policy, or from the conduct of the insurance company limiting or attempting to limit the time actually given in the limitation clause.

118 This, it appears to us, is the consistent and logical view that ought to be taken of such policies of insurance. It is fair to the insurance company and just to the insured. It would prevent either party from taking any undue or improper advantage of the other. The unwary could not be led into a trap and caught by any misrepresentation or delusive promise. The condition in

this policy which provides that no suit can be maintained for the loss incurred unless "commenced within twelve months next after the date of the fire" should therefore be construed, in the light of all of the other clauses and conditions, to mean twelve full months, not ten months nor seven months nor one month nor one day, in which to bring the suit, exclusive of the time when suit could not be brought either by other clauses or by any conduct of the company preventing the insured from bringing suit. In this case the right to bring suit being postponed in one clause of the policy for sixty days after the proofs of loss were furnished, the twelve months' limitation contained in another clause does not commence to run until after the expiration of the sixty days. This suit was, therefore, brought in time.

The construction we have given to this policy is in accord with common sense, which is said to be the soul and spirit of the law. It is in unison with sound legal and universally recognized interpretations of written instruments as well as with the justice and equity of the case. It is correct in principle, and is supported by the great weight of the authorities.

Freizen *v.* Allemaina Fire Ins. Co., 30 Fed. Rep., 352.
Vette *v.* Clinton Fire Ins. Co., 30 Fed. Rep., 668.
Spare *v.* Home Mutual Ins. Co., 17 Fed. Rep., 568.
119 Chandler *v.* St. Paul Fire Ins. Co., 21 Min., 85.
Mayor *v.* Hamilton Fire Ins. Co., 39 N. Y., 45.
Steen *v.* Niagara Fire Ins. Co., 89 N. Y., 315.
Ellis *v.* Council Bluffs Ins. Co., 64 Iowa, 507.
Miller *v.* Hartford Ins. Co., 70 Iowa, 704.
Barber *v.* Fire & M. Ins. Co., 16 W. Va., 658.
Murdock *v.* Franklin Ins. Co., 33 W. Va., 407.
Case *v.* Sun Ins. Co., 83 Cal., 473.
Owen *v.* Howard Ins. Co., 87 Ky., 574.

In Friezin *v.* Allemania Fire Ins. Co. the fire occurred June 23, 1885. Proof of loss was made July 31, 1885; the loss was not payable "until sixty days after proof of loss." Suit was commenced February 24, 1886, 7 months and one day after the fire, but within 5 months and 24 days after the sixty days after the proof of loss. The policy provided that no suit should be sustainable unless commenced within six months after the fire had occurred. Bunn, J., held that the suit was commenced in time; "that what the parties contemplated was that, after the loss became due and payable, the assured should have six months within any part of which time he might bring his suit."

In Vette *v.* Clinton Fire Ins. Co., where the provision in the policy was the same as in Friezin case except the word "loss" is used instead of the word "fire," Thayer, J., in delivering an oral opinion, hit the nail squarely on the head by saying that he could not see any "good reason for construing the special statute of limitations imported into this contract in such way as to make it operative during a period when, by virtue of other stipulations of the contract, the right of action was suspended."

120 In Chandler *v.* St. Paul Fire and M. Co. the court said: "It is natural that the parties should have intended to refer the commencement of the period of limitation to the date when the cause of action accrued, and that the time during which the assured could not sue should not be counted as part of the year within which they were required to sue."

In Steen *v.* Niagara Fire Ins. Co. the court said: "The intention of the defendant was to give the insured a full period of twelve months within any part of which he might commence his action; and having, by postponement of the time of payment, secured itself from suit, it did not intend to embrace that period within the term after the expiration of which it could not be sued. In other words, the parties cannot be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time. Indeed, the actual case is stronger. Not only was the remedy postponed, but the liability even did not exist at the time of the fire nor until it was fixed and ascertained according to the provision of the policy. Having thus made the doing of certain things and a fixed lapse of time thereafter conditions precedent to the bringing of an action, the parties must be deemed to have contracted in reference to a time when the insured, except for that contract, might be in condition to bring an action. Under any other construction the two conditions are inconsistent with each other."

The language used in the various conditions of the policy is that of the insurance company. Admitting, then, for the sake of the argument, that it could be fairly claimed that two different constructions might be placed upon the language used in the policy, it is, nevertheless, a wise and well-settled rule, sanctioned and
121 sustained by all the authorities, that the construction should be adopted which is most favorable to the insured; and in case of any doubt or uncertainty as to the meaning of words or of inconsistent or contradictory provisions in the policy as inserted by the company, they are to be construed most strongly against the company.

As the insurance company prepares the contract and embodies in it such conditions as it deems proper, it is in duty bound to use language in the various provisions of the policy in such a manner that the insured cannot be mistaken or misled as to the duties and burdens thereby imposed upon him.

The courts have uniformly held that the various conditions of a policy of insurance must be strictly construed against the company and liberally in favor of the insured. This principle is applied to all class of insurance policies, whether fire, life, accidental, or other kinds.

National Bank *v.* Insurance Co., 95 U. S., 673.
Moulor *v.* American Life Ins. Co., 111 U. S., 335.
Wallace *v.* Germania Ins. Co., 41 Fed. Rep., 742.
Cotton *v.* Fidelity & C. Co., 41 Fed. Rep., 506.
Graft *v.* Queen Ins. Co., 38 Minn., 501.
Kratzenstein *v.* Western Assurance Co., 116 N. Y., 59.
Burkhard *v.* Travelers' Ins. Co., 102 Penn. St., 262.

Philadelphia Tool Co. *v.* British-Am. Assurance Co., 132 Penn. St., 241.
Rodgers *v.* Phœnix Ins. Co., 121 Ind., 577.
Illinois Mutual Ins. Co. *v.* Hoffman, 132 Ill., 523.
Meyer & Co. *v.* Queen Ins. Co., 41 La. An. 1000.

122 In Wallace *v.* Germania Ins. Co., McCreary, J., in construing the award clause in the policy, said: "If the words employed of themselves or in connection with other language used in the instrument or in reference to the subject-matter to which they relate are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the insured."

In Kratzenstein *v.* Western Assurance Co. the court said: "Where an insurance contract is so drawn as to be manifestly ambiguous, so that reasonable and intelligent men on reading it would honestly differ as to its meaning, the doubt should be resolved against the company, because it prepared and executed the agreement and is responsible for the language used and the uncertainty thereby created."

In National Bank *v.* Insurance Co. there was a provision in the policy that if the insured in his application makes any erroneous representation or omits to make known any fact material to the risk, then the "policy shall be void." The insured made an overestimate as to the value of his property without any fraudulent intent. The insurance company contended that under any proper construction of the contract the assured warranted absolutely and without limitation the truth of the statement as to the value of his property. The court held that this contention could not be sustained, and based its conclusion "upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding con-
123 tract, the courts should lean against that construction which imposes upon the insured the obligations of a warranty. The company cannot complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

The judgment of the circuit court is reversed and the cause remanded with direction to the court to render a judgment in favor of complainant, as prayed for in the amended bill.

Endorsed: Filed July 18, 1892. F. D. Monckton, clerk.

124 United States Circuit Court of Appeals for the Ninth Circuit.

JAMES STEEL, Adm'r, &c., Appellant,
vs.
PHENIX INSURANCE COMPANY.

Appeal from the circuit court of the United States for the district of Oregon.

Before McKenna and Gilbert, circuit judges, and Hawley, district judge.

125 McKENNA, *J.*, dissenting:

I am unable to agree with my associates in their construction of the policy of insurance, and therefore think that this suit was not brought in time.

The provision of the policy is as follows:

"It is expressly provided and mutually agreed that no suit or action * * * shall be sustainable * * * unless such suit or action shall be commenced within 12 months next after the date of the fire from which such loss shall occur." * * *

This provision would seem to need no interpretation in other words than its own. It is so clear and direct as to baffle attempts to make it more so.

I know of no way to express concrete time except by commencing at a certain date or event, and the latter because it indicates a date, and running a certain duration after or to a date or event after. The duration or the interval marks the period not only as to length but especially as to time before and time after, distinguishing it, therefore, and establishing it, the period commencing at the initial date or event and immovable from it. This is important. The provision of the policy, therefore, is not 12 months to bring a suit only, but 12 months within which to bring a suit and to do other things; not 12 months to sue after all conditions precedent have been removed or performed, but 12 months within which to remove or perform all conditions precedent and to bring a suit. Substantially different things—as different as a period commencing at one date is different from a period commencing at another date,
126 as different as the year 1891 is from the year 1892. I do not think the rights of either party to the policy are subserved by confounding these differences.

Limitations of time of bringing suit on policies are sustained by authority, but with the qualification that they must be reasonable. If the conditions of the policy, therefore, cannot be performed within the period stated and a proper time be left for bringing suit the limitations would be unreasonable. If they should be used to delay or mislead they would be held to be suspended or waived, as was announced by the Supreme Court in this case on a former appeal. (136 U. S., 299.)

If the parties did intend to "expressly provide and mutually agree" to limit the right of suit within a particular period commencing at the fire—an unambiguous and impressive incident—how

else could they so aptly and adequately express than they did? How otherwise could they have so bounded and identified the period if they meant a fixed period, not a movable period? "12 months next after the fire" is unambiguous. This is conceded by my associates, but its certainty is made to yield to other provisions of the policy not more certain and which are entirely for the benefit of the defendant company. If the policy is to be construed most strongly against the insurer why not put it the other way and make the other provisions yield to the provision for suit and, as the company has stipulated that the insured shall have "12 months next after the fire" to bring suit, say that he shall have the whole of them and all provisions suspending or lessening them shall be void? This
127 way is as good as the other, and both bad, because neither accommodate the full purpose of the parties as I conceive it, which is that the insured shall have time to investigate a claim, arbitrate it, maybe, and the insured shall have a reasonable time to sue. Any policy that does not secure the latter would, as we have seen, be declared unreasonable; once secured it cannot be embarrassed by the acts of the insurer. This, we have also seen, was declared by the Supreme Court in this case.

Did the defendant company waive the provision requiring suit to be brought 12 months next after the fire? I do not think the allegations of the complaint that the plaintiff failed to sue by reason of the conduct of the company is sustained by the evidence. (See Thompson's testimony, page 89 to 94, inclusive, of the Record.)

Endorsed: Filed July 18, 1892. F. D. Monckton, clerk.

128 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1891.

JAMES STEEL, Administrator, etc., Appellant,
vs.
PHENIX INSURANCE COMPANY OF BROOKLYN. } No. 42.

Appeal from the circuit court of the United States for the district of Oregon.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Oregon and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, with costs, and the cause is remanded with direction to the court to render a judgment in favor of complainant, as prayed for in the amended bill.

Endorsed: Decree. Filed July 18, 1892. F. D. Monckton, clerk.

129 At a stated term, to wit, the October term, A. D. 1891, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Fran-

cisco, on Monday, the tenth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Joseph McKenna, circuit judge; Honorable Thomas P. Hawley, district judge; Honorable William W. Morrow, district judge.

JAMES STEEL, Administrator, etc., Appellant,
vs.
PHENIX INSURANCE COMPANY OF BROOKLYN. } No. 42.

The petition for rehearing of the appellee herein and also of T. C. Van Ness, Esquire, *amicus curea*, heretofore submitted to the court for consideration and decision, having been duly considered—

It is ordered that said petitions be, and the same are hereby, denied.

130 United States Circuit Court of Appeals for the Ninth Circuit.

JAMES STEEL, Administrator, etc., Appellant,
vs.
THE PHENIX INSURANCE COMPANY OF BROOKLYN. } No. 42.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be full, true, and correct copies of the printed record, the opinions of the court, the decree filed and entered, and the order entered denying petitions for a rehearing in the above-entitled cause as the originals thereof remain of record in my office.

I further certify that the issuance of a mandate to the court below in said cause has been stayed to and including the 13th day of December, 1892.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said circuit court of appeals, at San Francisco, this 11th day of November, A. D. 1892.

F. D. MONCKTON, *Clerk*.

131 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Being informed that there is now pending before you a suit in which James Steel, administrator of the estate of Ben. Holladay, deceased, is appellant and The Phœnix Insurance Company of Brooklyn is respondent, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the district of Oregon, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
132 States, do hereby command you, that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of February, in the year of our Lord one thousand eight hundred and ninety-three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

133 [Endorsed:] D. Supreme Court of the United States. No. 1260. October term, 1892. James Steel, adm'r, &c., *vs.* The Phœnix Ins. Co. of Brooklyn. Writ of certiorari. No. 42. U. S. circuit court of appeals, ninth circuit. Filed Feb. 8, 1893. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

As within we are commanded, we annex to and return a certified copy of the stipulation of counsel for the respective parties, duly filed in the cause within entitled, which said stipulation adopts the record already before the honorable Supreme Court of the United States as the final record in the cause, and consents that the same be taken and deemed as a return to the annexed writ.

San Francisco, Cal., February 15, 1893.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

134 In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES STEEL, Administrator, Appellant,
vs.
THE PHENIX INSURANCE COMPANY, Appellee.

It is hereby stipulated and agreed by and between counsel for the appellant and appellee in the above-mentioned cause that the tran-

script of the record heretofore filed by the appellee in support of its petition filed in the office of the clerk of the Supreme Court of the United States for a writ of certiorari, addressed to the above-entitled court, be taken and deemed as a return to the writ which has been awarded by said Supreme Court in accordance with the prayer of said petition, and that the printed record heretofore filed in said Supreme Court along with the printed petition be taken and deemed, for all purposes in connection with this cause in said Supreme Court, the printed record of the cause.

(Signed) GEO. H. WILLIAMS,
Of Counsel for Appellant.
L. B. COX,
Of Counsel for Appellee.

Endorsed: Filed February 14, 1893. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

135 I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true, and correct copy of a stipulation on file in the cause entitled James Steel, administrator, appellant, *vs.* The Phenix Insurance Company, appellee, No. 42, in our said United States circuit court of appeals, as the original thereof remains of record in my office.

Attest my hand and the seal of said circuit court of appeals, at San Francisco, California, this 15th day of February, A. D. 1893.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

Endorsed on cover: Case No. 15,230. Supreme Court U. S., October term, 1892. Term No., 1260. James Steel, adm'r of Ben. Holladay, dec'd, app't, *vs.* The Phenix Insurance Company of Brooklyn. Writ of certiorari and return. Office Supreme Court U. S. Filed Feb. 21, 1893. James H. McKenney, clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1892.

No. 1260.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, (A CORPORATION), PETITIONER,

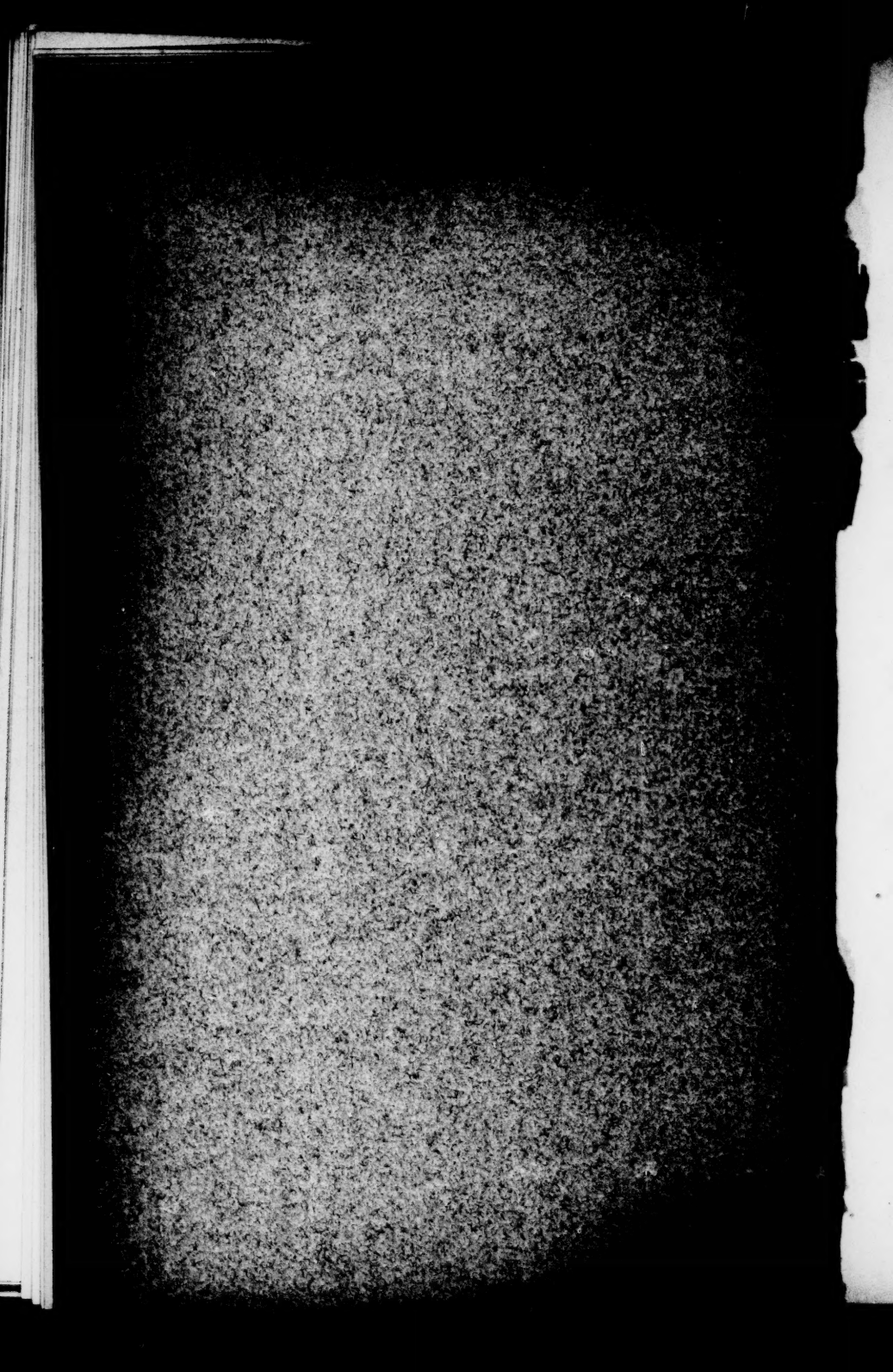
vs.

JAMES STEEL, ADMINISTRATOR OF THE ESTATE OF BENJAMIN HOLLADAY, DEC'D, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

L. B. COX,
Of Counsel for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No......

THE PHENIX INSURANCE COMPANY OF BROOKLYN (A CORPORATION), PETITIONER,

vs.

JAMES STEEL, ADMINISTRATOR OF THE ESTATE OF BENJAMIN HOLLADAY, DEC'D, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition of The Phenix Insurance Company of Brooklyn, a corporation incorporated under the laws of the State of New York, respectfully shows—

That heretofore, on the 10th day of July, 1885, a suit in equity was commenced against your petitioner in the circuit court of the United States, of the ninth circuit, in and for the district of Oregon, by one D. P. Thompson, as receiver in the suit of Holladay *vs.* Holladay; that the object of said suit was to obtain a decree reforming a policy of fire

insurance theretofore issued by your petitioner to one Edward S. Kearney, as receiver in said suit of Holladay *vs.* Holladay, by inserting therein after the words "Edward S. Kearney" the words "as receiver in the suit of Benjamin Holladay against Joseph Holladay, for and on account of his successors as such receiver and for the benefit of whom it might concern," and to obtain a decree for payment of the loss sustained, to wit, the sum of five thousand dollars and interest.

That the said D. P. Thompson, complainant in said suit, thereafter filed an amended bill therein, and your petitioner thereafter filed its answer to the same.

That in its said answer your petitioner denied that any mistake had occurred in framing the said policy of insurance or that your petitioner had ever agreed to issue its policy or to insure in the terms in which it was sought by the complainant to reform said policy; that the said policy contained a clause wherein it was expressly provided and mutually agreed that no suit or action for the recovery of any claim by virtue thereof should be sustainable in any court of law or chancery unless such suit or action should be commenced within twelve months after the date of the fire from which said loss should occur; and your petitioner pleaded, as the fact was, that the suit so commenced by the said complainant had not been commenced within twelve months after the date of the fire.

That before the final hearing of said cause in said circuit court the respondent herein was substituted for said complainant, D. P. Thompson, as such receiver, and thereafter the said circuit court, upon such final hearing, rendered a judgment and decree dismissing complainant's bill with costs.

That the said complainant, the respondent herein, thereafter appealed to the honorable the United States circuit court of appeals for the ninth circuit; that the said cause came on regularly to be heard before said United States

circuit court of appeals, and such proceedings were had therein that in the month of July, 1892, the said court rendered its judgment reversing the decree of the said circuit court and directing a decree to be entered therein in favor of the complainant; that the said judgment of the United States circuit court of appeals was rendered by Hawley, J., Gilbert, J., concurring and McKenna, J., dissenting, certified copies of whose several opinions are herewith presented.

And your petitioner respectfully represents that in the rendition of said judgment manifest error hath happened, to the great damage of your petitioner, in this:

That the said suit was instituted upon the equity side of the said circuit court; that the said amended bill sought a reformation of the said policy of insurance; that the answer of the defendant denied the allegations of said amended bill upon which said complainant's right of reformation was based; that the evidence adduced by the complainant wholly failed to sustain any of said allegations, and that no evidence was adduced by the defendant; that in the prevailing opinion of said circuit court of appeals it was determined "*that the intent of the parties appears upon the face of the policy itself, and that no reformation is required in order to enable plaintiff to maintain the suit.*" And your petitioner represents that the complainant's cause of action, if any, was one at law, and that this suit in equity could not be sustained merely for the purpose of decreeing the payment of money, and that inasmuch as said complainant presented no case for reformation of the policy the circuit court, sitting in equity, had no jurisdiction to proceed further in the cause.

Your petitioner further respectfully represents that in the rendition of said judgment of the said United States circuit court of appeals manifest error further occurred, in this:

That the said court held and decided that the complainant was not required by the condition of the policy herein-

before referred to to commence a suit or action within twelve months after the date of the fire, and that said twelve months' limitation did not commence to run until sixty days after proofs of loss had been furnished by the insured.

That after the rendition of said judgment your petitioner presented to said circuit court of appeals its petition for rehearing, wherein the said errors claimed by it to have been committed were represented to said court, and decisions were cited in support of said petition; that after considering said petition said circuit court of appeals, on the 10th day of October, 1892, entered an order denying a rehearing in said cause.

And your petitioner further respectfully represents that the determination of this cause involves the construction of a form of insurance policy now in general use with a number of insurance companies in the United States, and that both said insurance companies and a large number of persons holding such policies are interested in having said form of policy construed and declared by this honorable court, for that said form of policy has been variously construed by the courts of last resort in the several States and the Federal courts and great confusion exists in regard thereto, to the detriment of the insurance companies making use of such form of policy and the persons insured thereby.

And your petitioner further respectfully shows that this case was formerly before this honorable court upon an appeal taken from a decree of the circuit court of the United States for the district of Oregon sustaining a demurrer to the amended bill of complaint and dismissing the suit, and the issues tendered by said amended bill of complaint were considered by this honorable court, and the principles to govern the trial court in the further consideration and determination of the case were announced in the opinion then rendered, which is to be found reported in the 136th volume of the reports of this honorable court, at page 287, but that in the consideration and determination of this cause by the

honorable United States circuit court of appeals for the ninth circuit the views of this court touching the construction of the policy of insurance involved therein, as set forth in said opinion, were misapprehended or disregarded by said circuit court of appeals; that the conclusion reached by said court is at variance with the views of this honorable court upon the same subject, and that this cause has not been determined in accordance with the direction of this honorable court in their opinion hereinbefore mentioned, but in opposition thereto.

And your petitioner, being without further remedy in the premises, now respectfully presents this its petition, accompanied by a certified copy of the record in said cause, and also copies of the briefs filed by the complainant and respondent therein, and also a copy of said petition for rehearing, and prays that a writ of certiorari issue out of this court, directed to the said United States circuit court of appeals for the ninth circuit, requiring said circuit court of appeals to certify said case to this court for its review and determination.

And your petitioner will ever pray, etc.

[SEAL.] PHENIX INSURANCE COMPANY OF BROOKLYN,

By GEO. P. SHELDON, *President.*

L. B. COX,
Of Counsel for Petitioner.

STATE OF NEW YORK, }
City and County of New York, } ss:

George P. Sheldon, being duly sworn, deposes and says that he is the president of the Phenix Insurance Company of Brooklyn, the petitioner in the above-entitled action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge,

except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

GEO. P. SHELDON.

Subscribed and sworn to before me this 3d day of December, 1892.

[SEAL.] JOHN H. DOUGHERTY,
Notary Public, Kings Co., N. Y.

Certificate filed in N. Y. county.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 1260.

JAMES STEEL, ADMINISTRATOR, ETC., PLAINTIFF IN ERROR,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, DEFENDANT IN ERROR AND PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief and Argument on Behalf of Petitioner.

L. B. Cox,
Of Counsel for Petitioner.

JUDD & DETWEILER, PRS., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 1260.

JAMES STEEL, ADMINISTRATOR, ETC., PLAINTIFF IN ERROR,

vs.

THE PHENIX INSURANCE COMPANY OF BROOKLYN, DEFENDANT IN ERROR AND PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief and Argument on Behalf of Petitioner.

This suit was brought in the circuit court of the United States for the district of Oregon on July 10, 1885, by D. P. Thompson, as receiver, appointed by one of the State courts of Oregon, to procure reformation of a policy of insurance involved in the case and to recover the amount of the policy. The trial court dismissed the bill of complaint upon a demurrer thereto, which set up, among other things, that the suit had not been commenced within the limitation period

prescribed in the policy. An appeal was taken to this Court (Thompson *vs.* Phenix Insurance Company, 136 U. S., 287), and the cause was sent back to the trial court, Deady, J., presiding, and was heard on the issues joined by the pleadings and the evidence taken in support thereof. Upon such hearing the court dismissed the suit and rendered a decree in favor of the insurance company. From this decree an appeal was taken to the circuit court of appeals for the ninth circuit and was heard before McKenna, Gilbert, and Hawley, J.Js., and the decree was reversed by a divided court, Hawley, J., delivering an opinion which was concurred in by Gilbert, J., while McKenna, J., dissented. The defendant in error in the court of appeals now petitions this Court for a writ of certiorari and asks that the cause be brought here for final determination. It is in support of such petition that this brief is presented.

We understand that, however erroneous the conclusion of the court of appeals may be, this Court will not intervene by this extraordinary proceeding unless there is more to be accomplished by a determination of the questions involved than the mere settlement of a controversy between the parties to the suit; and, on the other hand, however important the questions may be, it must be shown that there is reasonable ground for believing that error may have been committed. We think the case under consideration will be found to present every essential requirement necessary to merit the favorable consideration of our petition.

We recognize the fact that it would be impertinent to the present status of the case to go into any extended discussion of the merits, and so we shall avoid great detail in presenting this aspect of the case.

We submit three propositions—

1. That the court of appeals found in effect that there was nothing in the case to support the jurisdiction of a court of equity, and that it then had no alternative but to dismiss the bill of complaint.

2. That said court erred in its construction of the limitation clause of the policy involved.

3. That said court erred in finding from the evidence that the insurance company had by its conduct waived the provisions of said clause.

The sole claim for equitable jurisdiction in this case arises from the contention that this policy could not be enforced by Thompson because it had been written to his predecessor in office and its terms were not sufficient to include Thompson. (See the amended bill of complaint, Record, pages 3, 7.)

The provisions of the policy in point are that—

"The Phenix Insurance Company of Brooklyn, in consideration of three hundred dollars and subject to and under the conditions hereinafter mentioned, do insure E. S. Kearney, receiver for Holladay *vs.* Holladay, against loss or damage by fire to the amount of five thousand dollars. * * *

"And the said Phenix Insurance Company hereby agrees to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage." * * * (Record, pp. 7, 8.)

This question was never decided in any of the stages of this case until it reached the court of appeals. When the case was formerly before this Court the *quære* was thrown out by Mr. Justice Harlan, who delivered the opinion, as to whether any reformation were necessary. (136 U. S., 287.)

Judge Deady did not pass upon the point, as he held it to be unnecessary for the determination of the case. (Record, p. 36.)

When the point came under consideration by the court of appeals in the majority opinion it was said:

"1. Can the policy be reformed?

"The right of plaintiff to have the policy reformed if the action can be maintained after it is reformed so as to be made payable to the receiver or his successors in office and thereby conform to the intention of the parties—if any reformation in that respect is necessary—is by the admissions in the answer and proofs upon the trial rendered too clear for any discussion upon the subject.

"*It is, however, proper to state in this connection that we are of opinion that the intent of the parties appears upon the face of the policy itself and that no reformation is required in order to enable plaintiff to maintain the suit as a representative of the interest of Holladay in said property.*" (Record, pp. 57–8.) The italics are, of course, ours.

The court could not have more clearly found that the claim of jurisdiction had failed and there was no alternative but to have dismissed the suit. There was no escape from this result under the decisions of this Court.

In Buzard *vs.* Houston, 119 U. S., it was said by Mr. Justice Gray, in delivering the opinion of the Court, at page 351:

"In the judiciary act of 1879 it is enacted that 'suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law.'"

Also that by the seventh amendment of the Constitution "in suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved," and the opinion proceeds:

"The effect of the provision of the judiciary act, as often stated by this Court, is that 'whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury' (citing cases). In a very recent case the Court said: 'This enactment certainly means something, and if only declaratory of what was always the law it must at least have been intended to emphasize the rule and to impress it upon the attention of the courts.'"

And again, on page 352:

"In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages when the like amount can be recovered at law in an action sounding in tort or for money had and received (citing cases)."

In the case of Dowell *vs.* Mitchell, 105 U. S., 430, the suit was upon promissory notes secured by mortgage upon property of a deceased partner. Upon its appearing that the mortgage was not valid it was held that a decree could not be given against the maker of the notes, the Court saying, page 432:

"When this fact was established by the evidence the court below, sitting as a court of equity, had no jurisdiction to proceed in the cause. There was nothing on which it could act but the promissory notes, and to enforce their payment the complainants had a plain, adequate, and complete remedy at law."

The similarity between this case and the one under consideration cannot but be remarked. See also Killian *vs.* Eddinghaus, 110 U. S., 568.

The fact that this point has been adverted to in all the

opinions which have been rendered in the case is sufficient proof that it has been a controverted one throughout; but that the Court is required to take cognizance of the matter *sua sponte* is established by Lewis *vs.* Cocks, 23 Wall., 466.

We insist, in the second place, that this policy was rightly construed by Deady, J., and by McKenna, J., on the appeal and wrongly construed in the prevailing opinion of the court of appeals in regard to the limitation clause, upon which the case must turn if there is jurisdiction to entertain it.

The provision is this:

"It is expressly provided and mutually agreed that no suit or action * * * shall be sustainable * * * unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur." * * *

There were other provisions in the policy in relation to suits, the most important of which in this connection is that no suit should be commenced until the expiration of sixty days from the time when proofs of loss were furnished.

The fire by which the loss was occasioned occurred May 19, 1884 (Record, p. 4), and this suit was brought July 10, 1885. (Record, p. 57.)

It seems to us too clear for argument that the limitation period must be counted to commence from the day the fire occurs and not from any subsequent uncertain event, and the weight of authority is altogether in favor of this position. This is a form of policy of comparatively recent adoption. In the older forms such expressions were used in this connection as "loss or damage shall occur" or "accrue," or "claim shall occur," or "after the loss." In such

cases there is about an equipoise of authority as to the construction of the language used. In the following decisions it was held that the initial point was the sixty-first day (or as the case might be) from the time the proofs of loss were furnished.

Steen *vs.* Niagara Fire Ins. Co., 89 N. Y., 315.
Mayor of New York *vs.* Hamilton Ins. Co., 39 *id.*, 45.
Hay *vs.* Star Fire Ins. Co., 77 *id.*, 235.
Chandler *vs.* St. Paul F. & M. Ins. Co., 21 Minn., 85.
Ellis *vs.* The Council Bluffs Ins. Co., 64 Iowa, 507.
Miller *vs.* The Hartford Fire Ins. Co., 70 *id.*, 704.
Vette *vs.* Clinton Fire Ins. Co., 30 Fed. Rep., 668.
Spare *vs.* Home Mut. Ins. Co., 9 Saw., 145.

We believe these include about all of the cases cited by opposing counsel upon the arguments herein in which this form of policy has been actually construed, although it is presented in several other decisions which are to be found in their briefs. In all of them the limitation period was held to commence at a prescribed time after proofs of loss had been furnished, the courts reaching such conclusion upon the expressed ground that there was *an ambiguity* in the language employed which was to be resolved most strongly against the insurer.

On the other hand, this reasoning is disapproved and the conclusion dissented from in the following cases:

Fullam *vs.* New York Union Ins. Co., 7 Gray, 61.
Chambers *vs.* Atlas Ins. Co., 51 Conn., 17.
Johnson *vs.* Humboldt Ins. Co., 91 Ill., 93.
Allemania Ins. Co. *vs.* Little, 20 Ill. App., 431.

Glass *vs.* Walker, 66 Mo., 32.
Bradley *vs.* Phœnix Ins. Co., 28 Mo. App., 7.
Virginia F. & M. Ins. Co. *vs.* Wells, 83 Va., 736.
Blanks *vs.* Hibernia Ins. Co., 36 La. Ann., 599.
Travelers' Ins. Co. *vs.* California Ins. Co., 45.
N. W. Rep. (North Dakota), 703.

And it seems to us the logic of the latter class of cases is far more convincing than of the first.

But when we come to a consideration of the form of policy involved here the weight of authority is decidedly in support of our position. In addition to the decisions of Judge Deady, which have been rendered in this case (11 Saw., 276 ; Record, p. 33), and, as we contend, the decision of this Court, a clause in this form has been considered in the following cases:

King *vs.* Watertown Fire Ins. Co., 47 Hun., 1.
Schroeder *vs.* Keystone Ins. Co., 2 Phila., 286.
State Ins. Co. *vs.* Meesman, 2 Wash., 459.
McElroy *vs.* Continental Ins. Co., 29 Pac. Rep. (Kans.), 478.
State Ins. Co. *vs.* Stoffels, *ib.* (Kans.), 479.

In all of these cases a distinction is drawn between this clause and the other form, and it is held without qualification that the limitation period commences to run from the time specified—the date of the fire. In Hocking *vs.* Howard Ins. Co. (130 Penn. St., 170) the court consider at some length a similar clause, and while they do not directly construe it the course of their discussion tends to the same re-

sult, and in Steen *vs.* Niagara Ins. Co. (89 N. Y., 315) there is an unqualified dictum to the same effect.

In the first of the Kansas cases above cited it is said:

"But in considering the cases cited a proper discrimination must always be observed between those policies which read 'after the loss,' 'from the loss,' 'from the time the loss occurs,' and this policy that reads 'within twelve months after the fire shall have occurred.'"

And in the second case it is said:

"The language of the limitation clause is not ambiguous, but it is so definite and distinct as to admit of no construction save a literal one. It says no action shall be sustained unless commenced within the term of six months next after the fire shall have occurred. * * * This language of the policy sued on differs from the language of those policies in which the limitation takes effect from the time when the 'action accrues,' or the 'loss occurs,' or which use some other more general and less definite language which must be construed by the courts. The language in this policy needs no construction, and, in fact, admits of none."

It is proper to state that these two cases were decided since this cause was submitted in the court of appeals.

In that court the following interrogatories are asked in the prevailing opinion:

"When does the twelve months' limitation commence to run?

"Is it from the date of the fire or from the expiration of sixty days after the proofs of loss were furnished?"

And then, after a more extended discussion of the question than we can reproduce here, it is said:

"In this case the right to bring suit being postponed in one clause of the policy for sixty days after the proofs of loss were furnished, the twelve months' limitation, contained in

another clause, does not commence to run until after the expiration of the sixty days. This suit was, therefore, brought in time." (Record, pp. 60, 62.)

McKenna, J., combated this conclusion in a brief opinion from which nothing can well be eliminated, and so we venture to reproduce it at length:

"The provisions of the policy is as follows:

"It is expressly provided and mutually agreed that no suit or action * * * shall be sustainable * * * unless such suit or action shall be commenced within 12 months next after the date of the fire from which such loss shall occur. * * *

"This provision would seem to need no interpretation in other words than its own. It is so clear and direct as to baffle attempts to make it more so.

"I know of no way to express concrete time except by commencing at a certain date or event—and the latter because it indicates a date—and running a certain duration after or to a date or event after. The duration or the interval marks the period, not only as to length, but especially as to time before and time after, distinguishing it, therefore, and establishing it, the period commencing at the initial date or event and immovable from it. This is important. The provision of the policy, therefore, is not twelve months to bring a suit only, but twelve months within which to bring a suit and do other things; not twelve months to sue after all conditions precedent have been removed or performed, but twelve months within which to remove or perform all conditions precedent and to bring a suit. Substantially different things; as different as a period commencing at one date is different from a period commencing at another date; as different as the year 1891 is from the year 1892. I do not think the rights of either party to the policy are subserved by confounding these differences.

"Limitations of time of bringing suit on policies are sustained by authority, but with the qualification that they must be reasonable.

"If the conditions of the policy, therefore, cannot be performed within the period stated and a proper time be left for bringing suit, the limitations would be unreasonable.

If they should be used to delay or mislead they would be held to be suspended or waived, as was announced by the Supreme Court in this case on a former appeal. (136 U. S., 299.)

"If the parties did intend to 'expressly provide and mutually agree' to limit the right of suit within a particular period commencing at the fire—an unambiguous and impressive incident—how else could they so aptly and adequately express than they did? How otherwise could they have so bounded and identified the period if they meant a fixed period, not a movable period? 'Twelve months next after the fire' is unambiguous. This is conceded by my associates, but its certainty is made to yield to other provisions of the policy not more certain, and which are entirely for the benefit of the defendant company. If the policy is to be construed most strongly against the insurer, why not put it the other way and make the other provisions yield to the provision for suit and as the company has stipulated that the insured shall have 'twelve months next after the fire' to bring suit, say that he shall have the whole of them and all provisions suspending or lessening them shall be void? This way is as good as the other, and both bad, because neither accommodates the full purpose of the parties as I conceive it, which is that the insurer shall have time to investigate a claim—arbitrate it may be—and the insured shall have a reasonable time to sue. Any policy that does not secure the latter would, as we have seen, be declared unreasonable; once secured, it cannot be embarrassed by the acts of the insurer. This we have also seen was declared by the Supreme Court in this case.

"Did the defendant company waive the provisions requiring suit to be brought twelve months next after the fire? I do not think the allegations of the complaint that the plaintiff failed to sue by reason of the conduct of the company is [are] sustained by the evidence. See Thompson's testimony, page 89 to 94, inclusive, of the record." (Record, pp. 65–6.)

In passing upon this case on the final argument, Deady, J., referring to the expression "the loss occurs," which was

contained in the policy involved in Spare *vs.* Home Mut. Ins. Co., 9 Saw., 145, decided by himself, said :

"The construction of the phrase naturally led the insurance companies to the use of language in naming the date or event from which the limitation should commence which would not admit of doubt as to its meaning: 'Twelve months next after the date of the fire from which the loss shall occur' was substituted for 'twelve months next after the loss shall occur.'

"No case has been found that gives any but a literal construction to the words 'date of the fire,' and, in my judgment, none will be." (Record, p. 36.)

An opposite construction is given to a similar clause to the one found here in Case *vs.* Sun Ins. Co., 23 Pac. Rep. (Cal.), 534, and Friezen *vs.* Allemania Ins. Co., 30 Fed. Rep., 352; but an inspection of the California case will show that it is entitled to but little, if any, weight as an authority, so that the other decision is the only one lending countenance to the result reached by the court of appeals in the majority opinion, and it is opposed to the construction placed by the Illinois appellate court, within the same circuit, upon the same form of policy. The court of appeals reached their conclusion largely upon the decisions which are based upon a wholly different form of policy, and ignored those which construe differently the form which was under their consideration.

We shall do no more in this connection than call attention to the opinion of this court upon the point now under discussion (136 U. S., 287). It is said :

"It remains only to consider the question arising out of the clause of the policy limiting the time within which a suit or action against the company for the recovery of the claim arising out of its provisions may be sustained.

While the validity of such a stipulation cannot be disputed (Riddlesbarger *vs.* Hartford Ins. Co., 7 Wall., 386–389), we do not doubt that it may be waived by the company, and such waiver need not be in writing. It may arise from such a course of conduct upon its part as will equitably estop it from pleading the prescribed limitation in bar of a suit by the insured. It is to be observed that by the terms of the policy the company is not obliged to pay any claim until after the expiration of sixty days from the receipt of the proofs of loss at its office in Chicago and the ascertainment of the loss in accordance with the terms of the policy. A suit, therefore, within the sixty days after the loss is so ascertained would, upon the theory of the company, be of no avail to compel payment if it chose to plead the above clause in bar of the action, so that, practically, the assured is limited to ten months within which he may sue as of right, and yet the twelve months within which suit must be brought is made to commence at "the date of the fire," not from the date when the loss is payable. There are, it is said, adjudged cases that would authorize such a construction of this policy as would give the insured the whole term of twelve months from the date when he could demand, as of right, that his claim for loss be satisfied. (Vette *vs.* Clinton Fire Ins. Co., 30 Fed. Rep., 668; Steen *vs.* Niagara Fire Insurance Co., 89 N. Y., 315, 322; Spare *vs.* Home Mut. Ins. Co., 17 Fed. Rep., 568, 570; Mayor, etc., *vs.* Hamilton Fire Ins. Co., 39 N. Y., 45, 48; Hay *vs.* Star Fire Ins. Co., 77 N. Y., 235, 244; Chandler *vs.* St. Paul F. and M. Ins. Co., 21 Minn., 85; May on Insurance, section 479, notes, 2d ed.) *We waive, however, any expression of opinion in the present attitude of the case as to the view announced in those cases, for its disposition only requires us to hold, as we do, that the allegations of the amended bill bearing upon this point sustain the right of the plaintiff to bring this action, although it was not commenced until after the expiration of twelve months from the date of the fire.* Those allegations are to the effect that the company, by its duly authorized agents, assured the plaintiff about thirty days after the fire and after the acceptance of the proofs of loss, that no question was made as to the loss or its payment, except that the company was considering the fact of the change in the receivership and that it would undoubtedly pay the loss claimed; that as late as June 27, 1884, the premium of three hundred dollars was

The fire occurred May 19, 1884, and the contention is that negotiations for a settlement of the loss were pending between the insured and the insurer until the 31st of August following, but no longer. (See Record, p. 27.)

The evidence as to this alleged delay is that of the witness Thompson only. We reproduce here its material parts:

"My name is D. P. Thompson; age, 57; residence, Portland; occupation, banking.

Q. Were you at any time receiver in the suit of Holladay *vs.* Holladay, pending in the circuit court of Multnomah county?

A. I was.

Q. State if you were the successor of E. S. Kearney as receiver in that suit.

A. I was.

Q. Do you remember the date when you became receiver?

A. I think on the 19th day of May, 1884.

Q. When was the building destroyed by fire?

A. I cannot give the exact date, but it was about that date—within a few days of the 19th of May, 1884, either before or after.

Q. On the day upon which that property was destroyed by fire had it been turned over to you by Kearney or was it still in his possession?

A. I believe it was still in Kearney's possession.

Q. Can you state about how long it was after you were appointed before the possession of the property which Kearney held as receiver was transferred to you?

A. No; I cannot; but it was not more than three or four days.

Q. Did this policy of insurance that was issued by the Phenix Insurance Company upon the Clarendon hotel property come into your hands as receiver?

A. It did.

Q. Who delivered it to you?

A. E. S. Kearney, my predecessor, delivered it with other papers.

Q. Who paid the premium on the policy to the company?

A. I paid it after I became receiver.

Q. (Cross.) Was it before or after the fire?

A. It was after the fire.

Q. How did you come to pay the premium; was there anything said to you about it by the company or its agents?

A. The agent stated to me that the premium had not been paid; that it would facilitate settlement; that it was necessary that it should be paid before the settlement and I paid it.

Q. Out of what funds did you make that payment?

A. Out of the funds that came into my hands as belonging to the estate of Ben. and Joe Holladay.

Q. Has that payment made by you been approved by the court, or was it approved by the court when you settled your accounts as receiver?

A. It was.

Q. State if you, at any time after you became receiver, expressed any determination to bring a suit against the company or threatened to bring a suit against the company.

A. I did, if the policy was not paid.

Q. Was there anything said to you at any time by the agents here of the company about settling for the loss, at or after the time you threatened to bring a suit against the company?

A. The agent offered to settle for one-half of the loss rather than have any suit about it; to pay one-half, which I refused to accept.

Q. Was there anything said by the agent to you with reference to the probabilities of a settlement by the company if a suit was not brought?

A. The agent told me that he *thought* that the company would pay the amount. He *thought they would, but he was not authorized to say.* He thought they would pay it, and advised me not to bring a suit; it would complicate matters somewhat, and he thought I had better not do it; urged on me not to do it.

Q. Was that after you had paid the premium, or can you give the date of that conversation or of any of such conversation you had with him?

A. It was very soon after the sixty days expired within which I had to do it, but I cannot give the date or time. I have no data, and it has been a good many years since.

Q. Did you delay bringing a suit in consequence of those statements made to you by the agent?

A. *I cannot say now. I do not remember.*

Q. Were you at any time informed or did you have any knowledge that the agent here had no power or right to receive the premium upon that policy?

A. Not to my recollection.

Q. Can you state about when it was that you were first informed that the company would not pay this loss?

A. I cannot give the date, but it was after the sixty days had expired in which to make the proofs, but I cannot give the time."

On cross-examination the witness testified:

"Q. You say that you were notified that the company declined to pay this loss very shortly after the expiration of the sixty days from the time the loss occurred?

A. Well, I say soon after that. I cannot give the date or the time.

Q. But it was a short time?

A. Yes; it was not long after.

Q. And after receiving that notice you relied no further upon any expectation that the company would pay voluntarily?

A. No; they promised to refer the matter to the home office, and they were some time, as a matter of course, getting their answers from there, but I cannot give the length of time that they required.

Q. What is your best judgment now as to the time when you gave up any hope of negotiating with the company for a voluntary settlement?

A. I cannot give that time; it may have been one month, it may have been two, it may have been three months.

Q. From the date of the loss, you mean?

A. No; from the date of the sixty days."

It is thus established that this delay, if it was caused by the act of the insurer at all, could not have extended beyond five months from the date of the fire as the extreme limit, and it is not contended that it extended beyond

August 31, 1884. At least seven months of the limitation period then remained, which, *as a question of law*, was ample time for commencing the suit, and any possible delay of which the insured may complain will not excuse the lapse of time which resulted before the suit was instituted. All the authorities so hold.

That the negotiations between Thompson and the agents of the insurance company under the circumstances detailed in his evidence could not have justified his action is sustained by McFarland *vs.* Peabody Ins. Co., 6 W. Va., 425 (a case directly in point); Waynesboro' Mutual Fire Ins. Co. *vs.* Conover, 98 Penn. St., 384; Gooden *vs.* Amoskeag Fire Ins. Co., 20 N. H., 73.

The burden of proof rested on the complainant to show that the delay had been thus occasioned, but when the suggestive question was put to Thompson, "Did you delay bringing a suit in consequence of those statements made to you by the agent?" he answered, "I cannot say now; I do not remember."

In reviewing the evidence relative to this point Judge Deady very pertinently said in his opinion (Record, p. 35):

"Of course, in the face of these facts, there could not be any truth in the allegation of the amended bill as to the cause of the delay in bringing this suit.

"The statements in the bill on this subject, which are denied by the answer, seem to have been the work of the attorney, which the receiver in his testimony utterly fails to support."

In the same opinion it was directly held that, allowing all that was claimed by the insured, there was ample time for

bringing this suit before the period of limitation expired, and in accord are—

Blanks *vs.* Hibernia Ins. Co., 36 La. Ann., 599.
Ripley *vs.* Ætna Ins. Co., 30 N. Y., 136.
State Ins. Co. *vs.* Meesman, 2 Wash., 459.
Travelers' Ins. Co. *vs.* California Ins. Co., 45 N. W. Rep., 703.
Garido *vs.* Insurance Co., 8 Pac. Rep. (Cal.), 512.
Garretson *vs.* Hawkeye Ins. Co., 65 Iowa, 468.

We believe that what we have said above will be held sufficient to show that the cause we present is entitled to further consideration upon its merits, and it only remains to discuss the claims it may have to the attention of the court on the ground of the importance of the questions involved.

In the case of Lau Ow Bew, Petitioner, 141 U. S., 583, which was a similar proceeding in regard to the same court, it was said by Mr. Chief Justice Fuller:

"It is evident that it is solely questions of gravity and importance that the circuit court of appeals should certify to us for instruction, and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the court of appeals is made final to be certified can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself and sufficiently open to controversy to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error." (Page 587.)

And in the same case, in 144 U. S., 47, 58, the Chief Justice said:

"In every case within its appellate jurisdiction the circuit court of appeals may certify to this court any questions or

propositions of law in respect of which it desires instruction, and this court may then require the whole record and cause to be sent up, and so it is competent for this court by certiorari to direct any case to be certified whether its advice is requested or not, except those which may be brought here by appeal or writ of error, and the latter are specified as those where the money value exceeds a certain amount, and which have not been made final 'in this section,' that is, made final in terms. And as certiorari will only be issued where questions of gravity and importance are involved or in the interest of uniformity of decision, the object of the act is thereby attained."

The statement of the conditions under which certiorari may issue implies the truth of its converse, that certiorari may issue in any case where the necessary conditions are found to exist.

The importance of the questions presented here, at least that as to the construction of the limitation clause, can be submitted within a very narrow compass. Fire insurance has become an absolutely indispensable incident of modern business transactions, in addition to being almost universally resorted to as a safeguard against loss in the matter of private residences and property. It is one of the most important factors in the commercial world. Everything which tends to simplify and make certain the relations between insurer and insured tends to the advancement of trade relations and the security of persons in their private possessions. The interests of both parties to the contract imperatively demand that the rights and liabilities of each should be reduced to the utmost degree of definiteness and simplicity.

It is alleged in the petition that a number of insurance companies are employing this form of policy, and the state-

ment is corroborated by the adjudicated cases which have been herein cited. It is safe to say that many thousands of persons are holding such policies to-day, and that they represent millions of dollars. Apart from the concern of the insurance companies, the question involved here is one of very general public interest, and the importance of its correct determination cannot be exaggerated.

When we come to the matter of the uniformity of decision, it will be seen at a glance that the utmost confusion prevails. Under the older forms of policy the courts placed hopelessly different constructions upon the same language. The rights of the insured depended not upon any general law, but upon the forum in which he might be called upon to prosecute a suit for the recovery of his claim; while the insurance companies who did business in different jurisdictions were constantly confronted with the problem of one law in Greece and another at Rome. To avoid this confusion the companies adopted a different form of policy and one whose expressions were thought to be so clear that no room for a double construction was left open, but the same trouble, it seems, has resulted as before.

This case presents an excellent illustration of our remarks. The learned district judge who tried the case below in a forceful opinion places one construction upon the language used, and in it he is sustained by one of the judges of the court of appeals. The other two judges of that court reach a different conclusion from the same premises. The case is an authority as it stands within the ninth circuit, but it cannot be accepted as a satisfactory solution of the question involved, and will not be received with the weight

a decision of that court ought to carry outside of the circuit. Within the circuit the supreme court of Washington in a strong opinion (hereinbefore cited) reach a diametrically opposite conclusion, while the supreme court of California *would seem* to be in accord with the opinion of the federal court of appeals.

This unfortunate discord can never be harmonized by anything short of an authoritative decision by this Court. It will, of course, be of binding effect upon all inferior federal courts, and it is believed the State courts will come to it as the one ground upon which may be attained uniformity of decision—a thing which the bench and bar are now striving so earnestly to accomplish. Never, until in this case, so far as we are advised, has the opportunity been given this Court to pass upon a question of the character presented here. We are of opinion that the Court have reached a conclusion adverse to that arrived at by the majority of the court of appeals. If, however, we are wrong in our interpretation of the opinion to which reference is made; if the question is still left open, it is highly important that it should be concluded before a greater lapse of time; and if the Court see that they have delivered an ambiguous opinion, one susceptible of a double construction and thereby liable to produce confusion and injury, we respectfully submit that the legal profession, as well as such persons as are directly concerned in the questions involved, are entitled to a further exposition of the subject and one which will be delivered with no uncertain sound.

Believing that we have sufficiently indicated, in the language of the Chief Justice, that this case is " of sufficient importance in itself and sufficiently open to controversy " to

warrant this Court in awarding the writ sought, we respectfully ask that the prayer of our petition may be allowed, and that this cause may be further heard and determined by this Court "in the interest of uniformity of decision."

L. B. Cox,
Of Counsel for Petitioner.

JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 1260.

JAMES STEEL, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF BEN HOLLADAY, DECEASED,
COMPLAINANT,

v.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, DEFENDANT.

IN THE MATTER OF THE PETITION OF DEFENDANT FOR WRIT OF CERTIORARI.

Brief of Geo. H. Williams for Complainant.

GEO. H. WILLIAMS,
Of Counsel for Complainant.

WILLIAMS & WOOD,
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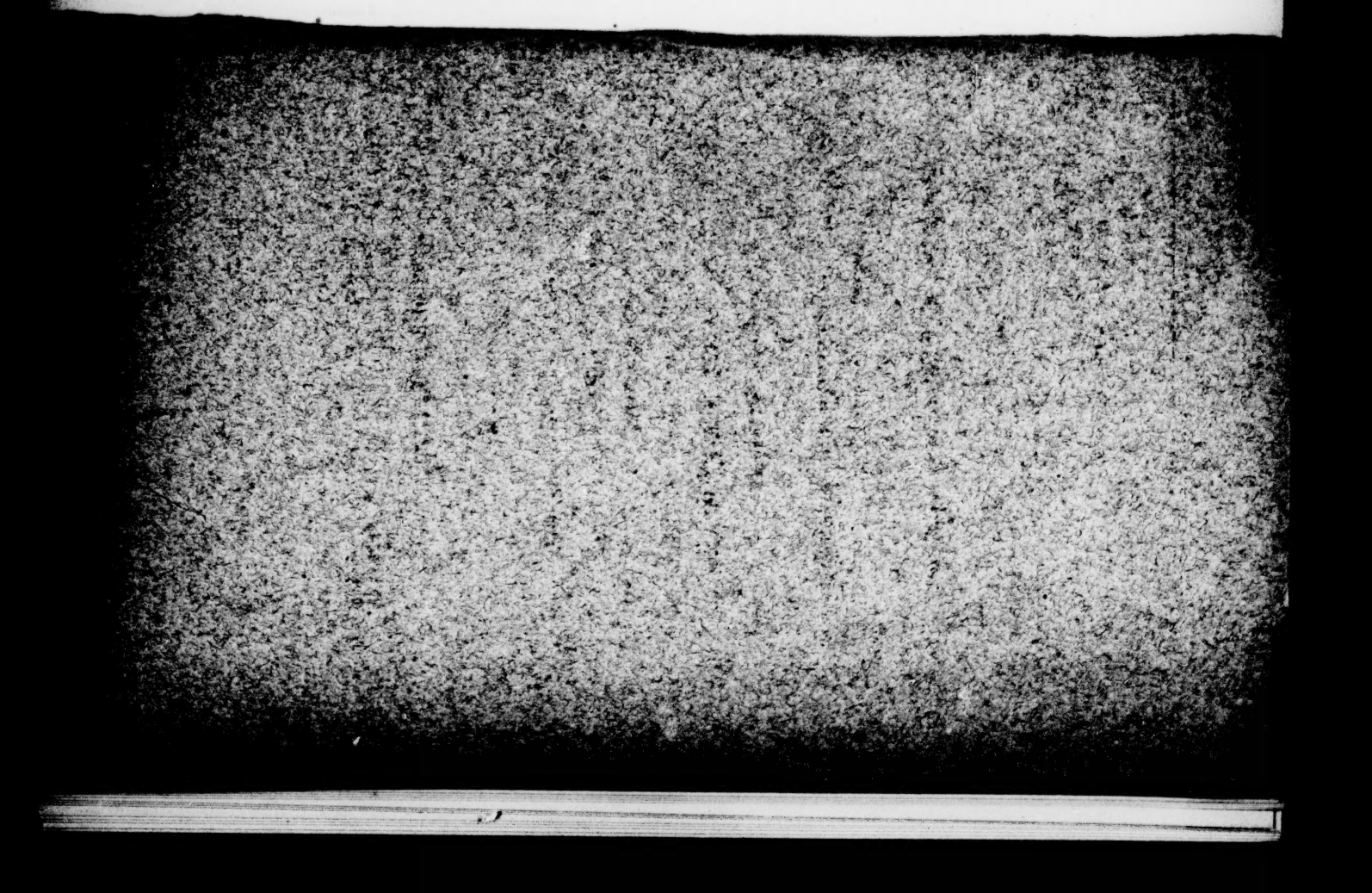

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Brief of Geo. H. Williams for Complainant.

We respectfully submit that a writ of certiorari ought not to issue from this court in the above entitled cause, for the following reasons.

I.

Primarily, if not exclusively, the object of the Act of Congress of March 3, 1891, under which the petition in this case

is filed, was to relieve this court from an overwhelming amount of business accumulating upon its docket. We think a certiorari in this case would be in contravention of the spirit and purpose of said act. This is an ordinary suit in equity to reform a written instrument and for a final decree. There is nothing to distinguish it from a hundred other suits pending in the country, except the barefaced dishonesty of the defendant.

On May 19, 1884, the property insured was destroyed by fire without the fault of anyone, and on June 27, 1884, thirty-nine days after the fire, the agent of the defendant demanded of Thompson, the receiver in the Holladay suit, and successor of Kearney, the premium of three hundred dollars, assuring him, at the same time, that the payment of such premium would facilitate a settlement.

Thompson paid the three hundred dollars, and thereafter the defendant, retaining the three hundred dollars, repudiated the claim of Thompson for the insurance money and refused payment thereof, on the sole ground that the policy of insurance ran to Kearney, as receiver in the Holladay suit, and not to Kearney *and his successor*.

These are the admitted facts; and we do not imagine that the Supreme Court of the United States will go far out of its way to sanction such a transaction.

We believe it was the intention of Congress, in providing for a certiorari in said act, to provide for a decision of the Supreme Court of the United States upon questions relating to the rights, interests, relations or duties of the general government, because a decision by this court upon a question of

that kind would establish a rule for all courts, state and federal, in the United States. But the only effect of a ruling by this court in this case would be to make a decision to be followed by other federal courts. This is true of every decision made by this court; and therefore, if a certiorari is to be allowed in this case for that reason, then, for the same reason, it should be allowed in every case where the law has not been previously settled by this court.

The different state courts have made different decisions upon the questions involved in this case, and no doubt will continue to do so; and these decisions will stand, and the lack of uniformity in the state courts will remain, irrespective of any decision of this court.

Whenever this court opens its doors to a certiorari in a case like this, its business, instead of being diminished, will be increased by the Act of March 3, 1891; for a losing party in a circuit court of appeals will always have some plausible pretext for applying to this court for a certiorari.

We do not see how in this case, upon principle, can be distinguished from the case of *In re Woods*, 143 U. S. 202, in which this court denied the writ of certiorari. The questions in that case seem to be as important as they are in this case; and in both cases the questions are not different in gravity from a hundred others arising in the courts of the country. We think the remark of the Chief Justice in the case of *Lau Ow Bew*, 143 U. S. 583, that "this branch of our jurisdiction should be exercised sparingly and with great caution," is a sufficient argument against the allowance of the writ in this case.

Touching the suggestion of the learned counsel for petitioner that insurance companies and others are anxious to have the questions in this case settled, we have to say that any decision in this case by this court would not necessarily or probably settle anything; for different insurance companies differ in the terms and conditions upon which they insure, and can and will change the phraseology of their policies, as to time and terms, whenever it appears to them that such a change will result to their advantage.

Some general rule regulating applications for a certiorari under the Act of 1891 seems to be necessary for the protection of this court and the information of the legal profession. We venture to suggest a general rule to the effect that applications for a certiorari from this court to a Court of Appeals will not be entertained under said Act of Congress when a decision of this court will not bind all courts, state as well as federal, in the United States. This is only another way of stating that writs of certiorari from this court will be confined to cases where the interest, duties, relations or obligations of the federal government are directly or indirectly affected.

Without something like this, there will be no end to experiments with the discretion of this court. Those of adequate means, and especially rich corporations, will bring all their cases before this court, with the hope that in some way they may have them reconsidered here, or, if not, that they may exhaust the other party by protracted and expensive litigation.

II.

Judge Hawley, delivering the opinion of the court below in this case, says :

"The right of plaintiff to have the policy reformed, if the action can be maintained after it is reformed, so as to be made payable to the receiver or his successor in office, and thereby conform to the intention of the parties—if any reformation in that respect is necessary—is by the admissions in the answer and proofs upon the trial rendered too clear for any discussion upon the subject. It is, however, proper to state in this connection that we are of the opinion that the intent of the parties appears upon the face of the policy itself, and that no reformation is required in order to enable plaintiff to maintain the suit as a representative of the interest of Holladay in said property."

Counsel for petitioner seize upon this passage with great avidity, and claim that the court of appeals erred in not dismissing the bill, upon the ground that plaintiff had an adequate remedy at law. Whether plaintiff had such a remedy or not was not argued in the Court of Appeals, and the reference of Judge Hawley to that matter was not at all necessary to the decision of the case; but, admitting the correctness of his dictum, it does not follow that the bill should have been dismissed.

When this case was before this court on appeal, (136 U. S. 287,) Justice Harlan, delivering the opinion of the court, said:

"The next question to be considered is whether the amended bill makes a case for the reformation of the policy. Its allegations, which are admitted by the demurrer to be true, show that before the policy was issued the agreement between Kearney and the company was that the insurance should run to him as receiver, and to his successors, and also to those

whom it might concern, and that, by inadvertence, accident, and mistake upon the part both of Kearney and the company, the policy was not so framed. The policy runs to 'E. S. Kearney, receiver for *Holladay v. Holladay.*' Whether Kearney's successor in the receivership might not recover upon the policy as it is, there being no question of limitation in the case, especially upon proof that the parties intended the insurance to cover the interest which the receiver, whoever he was at the time of the loss, represented, is a question that need not be considered. If, by inadvertence, accident or mistake, the terms of the contract were not fully set forth in the policy, the plaintiff is entitled to have it reformed so as to express the real agreement without the necessity of resorting to extrinsic proof."

Counsel for petitioner seem to think that this opinion of Justice Harlan is ambiguous; but there certainly is no ambiguity about the foregoing citation. It clearly announces an elementary rule in equity jurisprudence. It is well settled that if a mistake is made in drawing up a written instrument, a court of equity has jurisdiction to correct the mistake. The fact that there is a legal remedy is not the criterion. It must be a plain and not a doubtful remedy to oust the jurisdiction of equity.

Courts of equity have concurrent jurisdiction with courts of law in a great variety of cases. Whether, in an action at law upon the policy in question, parol evidence would have been admitted to prove a mistake, is at least doubtful ; and therefore, as Justice Harlan says, plaintiff was entitled to have the policy reformed "without the necessity of resorting to external proof." That is to say, plaintiff was not bound to take the doubtful chances of an action at law upon a policy which did not express the contract of the parties, but had a right to go into a court of equity, where it was certain he

could have the mistake corrected, and his rights established according to the contract as it was made. Defendant, acting (as it alleges in its answer) upon legal advice, refused to pay the insurance money, upon the ground that Thompson, a successor in the receivership to Kearney, could not maintain an action on the policy, because it did not run to Kearney as successor; and therefore it comes with poor grace from the defendant to say now that plaintiff cannot maintain a suit in equity to reform a policy because he had a perfect remedy at law.

Moreover, if the right of Thompson to maintain an action at law appears upon the face of the policy, which we do not admit, the defendant should have demurred, instead of answering and litigating the case through the courts and now trying to avail itself of that defense in a petition for a writ of certiorari.

Suppose that the court below erred in not dismissing this case. Is that any ground for a certiorari? A decision here that the facts in this case did not give equity jurisdiction would not affect any other case where the facts are different. Such a decision would be simply to hold that the right to a writ of certiorari under the Act of 1891 is equivalent to the right of appeal under the old law.

III.

It cannot be successfully denied that the great weight of authority is in favor of holding that where the policy provides that the right of the insured to sue upon it shall be limited to one year after the loss, the insured has not only

that year, but, in addition thereto, the sixty days during which the insured is barred by the terms of the policy from bringing suit.

The policy under consideration uses the word "fire" instead of the word "loss." The court of appeals held that there was no substantial difference in the meaning of these two words, when taken in connection with the other terms of the policy.

Is it necessary for this court to interfere by its extraordinary writ of certiorari to arrest the results of this ruling? If respectable courts had not held otherwise, we should not hesitate to say that the difference between the words "fire" and "loss," for the purposes for which they are used in policies of insurance, is about the same as the difference between "tweedledum" and "tweedledee." The words in the one policy are "one year after the loss"—in the other, "one year after the fire." Do not these expressions mean the same thing?

Does not the loss occur to all parties interested when the property is consumed by fire? To say that the loss occurs when the insurance company gets through contending and quibbling about paying for the loss is an absurdity. One might as well say that a man burned up in a fire is not dead until a coroner's inquest has decided whether his death was due to incendiarism or accident. The common understanding of mankind as to property destroyed by fire is that the dates of its *destruction* and its *loss* are identical.

Reference is made by counsel for petitioner to the opinion of Judge Deady in this case. In the case of *Spare v. Home Mut. Ins. Co.*, 17 Fed. Rep. 568, which was a case in which

a suit was commenced fourteen months and fourteen days after the fire, to reform a policy of insurance and recover a judgment for the loss, Judge Deady, in his opinion, said :

"On the authority of adjudged cases (*Davidson v. Phœnix Ins. Co.*, 4 Sawy. 594; *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 398; *May Ins.*, section 478,) it is admitted by counsel for the plaintiff that this clause in the policy, limiting the time within which a suit may be commenced thereon against the defendant, is valid; but they contend that it must be read in connection with that other clause which provides that a loss does not become payable until sixty days after the proof of that fact is made, and that, taken together, the reasonable construction of them is that the right to sue on the policy being postponed until the loss is payable—namely, sixty days after proof thereof,—the twelve months limitation upon such right does not commence to run until that time. This construction is supported by the decided weight of authority, and in my judgment is correct on principle,"—citing authorities.

Judge Deady undertakes to distinguish this case from the Spare case upon the ground that in the Spare case the word "loss" was used, and in this the word "fire." Does not his reasoning in the Spare case apply with equal force to this suit ? He says, and the precise point decided by him in the former case is, that the limitation does not begin to run until the insured can bring a suit under the terms of the policy. He decides expressly that the sixty days after the fire are not included in the limitation, because the insured could not sue within that time. Is not that equally true in this case ? Such technical and fine-spun distinctions tend to bring reproach upon the administration of the law.

Why should not limitation by contract stand upon the same footing as statutes of limitation ? All legislative enact-

ments and judicial decisions declare and hold that a statutory limitation does not run against a party while he is under a disability to sue, and the reason and justice of this ruling are universally recognized.

This court has decided that the statute of limitations did not run against a party during the civil war because he was unable to bring his suit during that period. *Ross v. Jones*, 22 Wall. 384.

Since the trial of this case in the Court of Appeals, the Supreme Court of Utah has construed a policy of insurance in which the word "fire" is used instead of the word "loss;" and we quote from the unanimous opinion of that court in the case of *Hong Sling v. Royal Ins. Co.*, 30 Pac. Rep. 307, as follows :

"Ordinarily, where a party has given time in which to begin an action, he has the whole of that time in which to bring it, and we hold that, where a policy of fire insurance provides that no suit shall be brought on the policy unless begun within a specified time after the fire, and which policy provides that no suit shall be brought until after an arbitration shall be had, or other act done, which extends or may extend indefinitely the time in which the suit may be brought, the true intent of the parties is that the twelve months' limitation does not begin to run until the case of action accrues, unless it is delayed through the fault of the insured. These views are supported by the overwhelming weight of authority. Among the numerous authorites which might be referred to, we cite : *Case v. Insurance Co.*, 83 Cal. 473, 24 Pac. Rep. 534; *Steen v. Insurance Co.*, 89 N. Y. 315; *Friezen v. Insurance Co.*, 30 Fed. Rep. 352; *Barber v. Insurance Co.*, 16 W. Va. 658. *Ellis v. Insurance Co.*, 64 Iowa, 507, 20 N. W. Rep. 782; *Longhurst v. Insurance Co*, 19 Iowa, 364; 2 *Wood Ins.* sec. 469; 2 *May Ins.* (3d Ed.,) secs. 487, 492; *Chandler v. Insurance Co.*, 21 Minn. 85; *Mayor v. Hamil-*

ton Fire Ins Co., 39 N. Y. 45; *Killips v. Insurance Co.*, 28 Wis. 484; *Arthur v. Insurance Co.*, 78 N. Y. 492; *Miller v. Insurance Co.*, 70 Iowa, 704, 29 N. W. Rep. 411; *Old Saucelito Land & Dry Dock Co. v. Commercial Union Insurance Co.*, 66 Cal. 253, 5 Pac. Rep. 232; *Holmes v. Richet*, 56 Cal. 307."

Mr. Justice Harlan, in the opinion of this court, *supra*, cited several of the above-named cases and others; but, as it seems, it did not occur to him that they were inapplicable to this case because the policy here used the word "fire," and the word "loss" was used in every one of the policies referred to in these cases.

It is said that an insurance policy is a contract. This is more of a theory than a fact. Printed forms of policies are prepared by insurance companies, and a person desiring insurance must take one of these or nothing. These policies differ somewhat in the forms of expression, but they are very much alike in the conditions, limitations and restrictions which they impose on the policy-holder and which curtail the liability of the company to a very narrow basis. Fire insurance companies form combinations to prevent competition, and then adopt the "stand and deliver" style of making a contract. The only alternative of not accepting their terms is to go without insurance.

Courts hold, of course, that these policies are contracts; but, according to the decisions of this court, they are to be liberally construed, and every reasonable intendment made in favor of the insured. *Insurance Co. v. Wilkinson*, 13 Wall. 222.

Suppose that the limitation commences to run at the end of sixty days after proofs of loss are delivered, instead of commencing to run at the date of the fire. What evil results can follow? What great matter is involved? Surely, under one rule as well as the other, the questions at issue can be disposed of at an early day, and while the facts are fresh in the memories of those concerned.

IV.

We contend that the decision of the court below was correct, upon the ground that plaintiff was delayed "some time" in bringing his suit by the acts and representations of the defendant; and we further contend that this point has been decided in our favor in this case and by this court.

This suit was brought thirteen months and twenty-one days after the fire, and was dismissed by Judge Deady upon the ground that it was not commenced within twelve months after the fire.

This court reversed his decision, and the reasons are succinctly given by Mr. Justice Harlan as follows:

"Those allegations are to the effect that the company, by its duly authorized agents, assured the plaintiff about thirty days after the fire, and after the acceptance of the proofs of loss, that no question was made as to the loss or its payment, except that the company was considering the fact of the change in the receivership, and that it would undoubtedly pay the loss claimed; that as late as June 27, 1884, the premium of $300 was paid to the company, which by its agents again assured the plaintiff that the loss would be paid as soon as action could be taken; that, after sixty days had elapsed from the delivery of the proofs of loss, the company, by its agents,

repeatedly gave the same assurances; and that, by reason of such promises and assurances, he neglected *for some time after sixty days from the delivery of proofs of loss to bring suit for the recovery of the loss sustained.*"

We submit that the plain meaning of this language is that the time during which plaintiff was delayed in bringing his suit by defendant was to be added to the twelve months, and that if the suit was commenced within the period resulting from this addition, it was not barred by the policy.

Now, the allegation of the bill is not that plaintiff neglected to bring suit for some time after the expiration of the year in consequence of the promises of defendant, but that in consequence of such promises he neglected to bring suit for "some time after the sixty days from the delivery of the proofs of loss." This might be true, and yet no obstacle exist to a suit during the remaining seven or eight months of the twelve. But this court has decided that because plaintiff was delayed for "some time after the sixty days from the delivery of the proofs of loss," he was entitled to thirteen months and twenty-one days in which to bring suit. How was it possible to make this decision without, for some reason, adding some time to the twelve months ?

Judge Deady decided that seven months of the twelve was a reasonable time in which to commence this suit, and that because seven months elapsed between the time when defendant notified plaintiff that it would not pay the loss and the commencement of suit, this suit was barred. It seems to us that this ruling is in direct conflict with the above-mentioned decision of this court. Judge Deady allowed Spare fourteen months and fourteen days in which to sue, because he could

not bring suit according to the terms of the policy until sixty days after the proofs of loss had been furnished. The logic of these decisions is, that what is sauce for the goose is not sauce for the gander. We think Judge Deady was right in the Spare case, and wrong in this case. An insurance company has a right by the terms of its policy to take up two, four, six or eight months of the twelve in examining the evidence of the loss and its liability, before deciding to pay or not to pay; and according to Judge Deady's last decision the limitation, instead of being fixed by contract or law, rests in the judgment of the court as to what is or is not a reasonable time within which to sue. This doctrine is fraught with confusion and uncertainty. Where the statute of limitations is six years, and a suit is brought at the end of four years from the time when the cause of action accrued, would a court be justified in deciding that the suit is barred because four years was a reasonable time in which to bring suit? Upon this point we cite the following from *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 483:

"It does not seem to require much argument to demonstrate that if, by any act or omission of the responsible officers and agents of the defendant, the plaintiff should be induced to suspend action in the premises for a given time, such a time should not be deemed a part of the twelve months to which his right of action is limited by the original contract. * * * The plainest principles of justice demand that the time thus lost by the plaintiff, without any fault on his part, but through the fault of the defendant, should be added to the term within which they contracted in the first instance that the action should be commenced, and the plaintiff be not barred of his remedy on the policy until such additional time has expired."

We forbear to discuss the evidence in support of the allegations of the bill as to the acts and representations of the defendant in delaying suit, but refer the court to what Judge Hawley says upon that subject in his lucid and convincing opinion, which we hereto append and beg that it may be considered as a part of this brief.

The court will not fail to notice that the answer of defendant admits that the premium of $300 was paid by Thompson thirty-nine days after the fire, and, as Thompson testifies without contradiction, upon the assurance of the agent of the defendant "that it would facilitate settlement, that it was necessary that it should be paid before the settlement," and also that the answer alleges that Thompson was notified on August 31st, three months and twelve days after the fire, that the home office had decided not to pay the loss.

Judge Deady, in his first decision in this case, sustaining a demurrer to the bill, (14 Sawyer, 276) said:

"This conclusion is not reached without reluctance. So far as appears, there is, in good morals, no sufficient reason why the defendant should not pay this claim according to the real intention of the parties to the contract,—that is, to the receiver for the time being in the case of *Holladay v. Holladay*, for the benefit of whom it may concern."

Which remark led plaintiff to believe that the courts would not strain the evidence to find reasons for finally deciding the case for defendant.

We make this additional suggestion. Whether or not plaintiff was delayed in bringing this suit by the defendant is purely a question of fact. The Circuit Court of Appeals has

found as a fact that plaintiff was so delayed, as alleged in the bill. Will this court upon certiorari reverse this finding of fact? Are all disputed questions of fact decided by the Circuit Court of Appeals to be re-examined here upon certiorari? If not, why should defendant have a certiorari in this case?

We submit that the law and equities of this case are clearly against defendant's petition.

GEO. H. WILLIAMS,
Of Counsel for Complainant.

WILLIAMS & WOOD,
Attorneys for Complainant.

APPENDIX

OPINION OF JUDGE HAWLEY.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

JAMES STEEL, Administrator of the Estate of Ben Holladay, Deceased, Appellant,
v.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, Appellee.
} Filed July 18, 1892.

Appeal from the United States Circuit Court for the District of Oregon.

Williams & Wood, for Appellant; Cox, Teal & Minor and W. S. Goodfellow, for Appellee.

Before McKenna & Gilbert, Circuit Judges, and Hawley, District Judge.

HAWLEY, *J.:*

On the 21st day of April, 1884, the Phenix Insurance Company of Brooklyn, in consideration of three hundred dollars, subject to the terms and conditions expressed in a policy of insurance, insured "E. S. Kearney, receiver for Holladay *vs.* Holladay, against loss or damage by fire to the amount of five thousand dollars as follows: $4000 on their one-half

interest in the four-story frame building occupied as a hotel, and known as the Clarendon hotel, * * * Portland, Oregon; $1000 on their one-half interest in the hotel furniture while contained therein, to make good unto the said assured, their executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured * * * as shall happen by fire to the property so specified, from the 27th day of April, 1884, at 12 o'clock at noon, to the 27th day of April, 1885, at 12 o'clock at noon, the amount of loss or damage * * * to be paid sixty days after the proofs of the same required by the company shall have been made by the assured and received at the office in Chicago." This policy contained thirteen specific conditions, besides several notes and paragraphs. The 10th provided for the selection of arbitrators in the event the amount of the loss could not be determined by mutual agreement. The 13th reads as follows: "13. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of fire from which such loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim *and* statute of limitation to the contrary notwithstanding."

At the time of the execution and the delivery of this policy the insurance company well knew that the title to said property was in dispute in the suit of Holladay *vs.* Holladay, and that said Kearney was in possession of the property merely as the receiver in said suit and had no interest therein of any nature except as such receiver.

On May 14th, 1884, an order was made in said suit accepting the resignation of said Kearney as receiver and appointing D. P. Thompson as receiver in his stead. On the 19th of May, 1884, the said Thompson duly qualified as such

receiver, and thereafter, on the night of the same day, the said insured property, without any fault, failure, neglect or omission on the part of said Kearney, Thompson, or of any other person, was totally destroyed by fire, and a loss was sustained in a sum greater than the amounts specified in the policy.

This suit was commenced on the 10th day of July, 1885, thirteen months and twenty-one days after the fire, by Thompson, as the successor of Kearney in the receivership, to reform the policy so as to be made payable to the receiver and his successors in office, for the benefit of whom it might concern, and for a decree to recover the amount due upon said policy.

A demurrer to the original bill was sustained on the ground that the plaintiff's right of action was barred because the suit was not commenced "within twelve months next after the date of the fire from which the loss occurred."

Thompson v. Phœnix Ins. Co., 25 Fed. Rep. 296.

An amended bill was thereafter filed alleging conduct on the part of the insurance company which, it was claimed, amounted to a waiver of the limitation of time for the commencement of the suit. A demurrer to this bill was also sustained and the suit dismissed. From that decree an appeal was taken to the Supreme Court of the United States, and the decree was reversed upon the ground that the allegations of the amended bill showed a waiver of the limitation as to the time of bringing the suit.

Thompson v. Phœnix Co., 139 U. S. 299.

On July 12th, 1886, Thompson was removed from the receivership and G W. Weidler and Joseph Holladay were appointed in his place. Thereafter the suit of Holladay *vs.* Holladay was decided in favor of Ben. Holladay and the receivers were discharged. On July 8th, 1887, Ben. Holladay died, and on June 3d, 1889, James Steel, his administrator, was made plaintiff in this suit. Thereafter this suit was again tried, and the court held that the allegations of the amended bill were not sustained by the evidence and dismissed the suit. (Steel *v.* Phœnix Ins. Co., 47 Fed. Rep. 863). From this decree the present appeal is taken.

1. Can the policy be reformed?

The right of plaintiff to have the policy reformed, if the action can be maintained after it is reformed, so as to be made payable to the receiver or his successor in office, and thereby conform to the intention of the parties—if any reformation in that respect is necessary—is by the admissions in the answer and proofs upon the trial rendered too clear for any discussion upon the subject. It is, however, proper to state in this connection that we are of the opinion that the intent of the parties appears upon the face of the policy itself, and that no reformation is required in order to enable plaintiff to maintain the suit as a representative of the interest of Holladay in said property.

2. Are the allegations of the amended bill as to the conduct of the insurance company in delaying the commencement of the suit sustained by the evidence? These allegations are, in substance, that the insurance company, by its duly authorized agents, assured the plaintiff, about thirty days after the fire and after the acceptance of the proofs of loss, that no question was made as to the loss or its payment except that the company was considering the fact of the change in the receivership, and that it would undoubtedly pay the loss claimed; that as late as June 27, 1884, the premium of three hundred dollars was paid to the company, which by its agents again assured plaintiff that the loss would be paid as soon as action could be taken; that after sixty days had elapsed from the delivery of the proofs of loss the company, by its agents, repeatedly gave the same assurances, and that by reason of such promises and assurances the plaintiff neglected "for some time after sixty days from the delivery of the proofs of loss to bring suit for the recovery of the loss sustained." The testimony in support of these allegations is very brief.

It is admitted that the payment of the premium of three hundred dollars was made on the 27th of June, 1884, as alleged in the bill. Thompson testified that the agent of the company stated to him "that the premium had not been paid, and that it would facilitate settlement;" that he paid it; that he threatened to bring suit against the company if the loss was not paid; that the agent offered to settle by pay-

ing one-half of the amount specified in the policy rather than have any suit about it; that he refused to accept this offer; that the agent then told him "that he thought that the company would pay the amount; he thought they would, but he was not authorized to say; he thought they would pay it and advised me not to bring a suit; it would complicate matters somewhat, and he thought I had better not do it; urged me not to do it;" that this was very soon after the sixty days expired. "I cannot give the date or time; I have no date, and it has been a good many years since." That he was first informed that the company would not pay the loss after the sixty days had expired in which to make the proofs; that after this the agent of the company promised to refer the matter to the home office, and they were some time, as a matter of course, getting their answer from them; that he could not give the exact time when he gave up any hope of negotiating with the company for a voluntary settlement; that it may have been one month, it may have been two, or it might have been three months from the expiration of the sixty days. The answer of the company alleges that notice was given to Thompson on the 31st day of August, 1884. "that the defendant denied any liability upon said policy and did refuse and would at all times refuse to pay said loss."

The insurance company rely upon an answer given by Thompson to a question propounded to him to show that there was no delay in bringing the suit which was caused by any conduct upon the part of the company. The question and answer *is* as follows: "Q. Did you delay bringing a suit in consequence of those statements made to you by the agent? A. I cannot say now; I do not remember."

This answer of the witness must be taken with reference to the other portion of his testimony which stated the facts, showing beyond any controversy that the bringing of the suit was delayed for one, two, or three months—some time after the expiration of the sixty days.

The Supreme Court, in deciding that the allegations in the amended bill were sufficient, said:

"If, as the allegations of the amended bill imply, the failure of the plaintiff to sue within the time prescribed by the policy, computing the time from the date of the fire, was due

to the conduct of the company, it cannot avail itself of the limitation of twelve months.

Curtis v. Home Ins. Co., I Biss. 484, 487.
Ide v. Phœnix Ins. Co., 2 Biss. 333.
Grant v. Lexington Ins. Co. 5 Ind. 23, 25.
Michey v. Burlington Ins. Co.; 35 Iowa, 174, 180.

In the case last cited it was properly said that it would be contrary to justice for the insurance company to hold out the hope of an amicable adjustment of the loss and thus delay the action of the insured, and then be permitted to plead this very delay, caused by its course of conduct, as a defense to the action when brought."

The following authorities are to the same effect:

Ames v. Ins. Co., 14 N. Y. 264.
Killips v. Putnam Fire Ins. Co., 28 Wis. 483.
Insurance Co. v. Brodie, 52 Ark. 11.
St. Paul Fire & M. Ins. Co. v. McGregor, 63 Texas, 404.

In the Texas case the court said:

"If the course of conduct pursued by the appellant was such as to induce the appellee to believe that the loss would be adjusted and paid without suit, and for this reason suit was not brought within the time prescribed, then, under the well-settled principles applicable to such cases, this action may be maintained on the policy even after the expiration of the time therein prescribed."

The views expressed by the Supreme Court of the United States are as applicable to the evidence in this case as to the allegations of the bill. The most that was claimed in the bill was that by the conduct of the insurance company the plaintiff was delayed in bringing the suit for some time after sixty days from the delivery of the proofs of loss, and this is shown by the evidence.

3. The contention of the insurance company is that its conduct, in any event, only prevented this suit from being brought for five months after the fire, and that this only amounted to a waiver of so much of the limitation, and that, as there still remained seven months a-reasonable time-within which to bring suit, the action is barred because not

brought "within twelve months next after the date of the fire.' Is this contention sound?

Is it supported by any substantial reason?

When does the twelve months' limitation commence to run?

Is it from the date of the fire or from the expiration of sixty days after the proofs of loss were furnished?

Numerous and respectable authorities can be found in support of either view, and, inasmuch as they are in direct conflict, it becomes the duty of this court, upon the first presentation of the question, to determine which view is sustained by the weight of reason and ought in justice to be followed

In several of the authorities where these questions have been discussed, the policies of insurance provided that no suit could be sustained unless brought within six or twelve months "after the loss shall have occurred" instead of "after the fire." and some of the cases intimated that the language should be construed differently. We are, however, of opinion that there is no real or substantial difference in principle between the meaning of the words "loss" or "fire" as used in the policies. The loss occurs at the time of the fire.

If the provision in the policy is to be construed solely with reference to the language of the clause in which the limitation is expressed, independent of any other fact or condition expressed in other clauses of the policy, then, of course, the suit cannot be maintained unless brought "within twelve months next after the date of the fire from which such loss shall occur."

It is the duty of courts, however, to arrive at the intention of the parties by an examination and consideration of the entire instrument, its various clauses and conditions, and the objects and purposes which the parties had in view at the time of the execution, acceptance, and delivery of the policy.

In determining the intention of the parties it is our duty to examine the whole instrument in order to ascertain, if possible, the true meaning of clauses which in a certain light might be deemed contradictory, and to gather from the various clauses the real object and purpose which the parties intended by the instrument as a whole. When this is ascertained,then the language of the clause in controversy must be so inter-

preted as to give full force and effect to the true intention of the instrument as a whole.

With these general rules applicable to the construction of all written instruments, whether it be a deed, contract, or policy of insurance, we shall proceed to an examination and review of certain other conditions in the policy.

After the fire the insured is required to give notice of any loss and to make the necessary and satisfactory proofs thereof, and the company is allowed sixty days after such proofs have been received at the home office in Chicago to pay the amount of loss or damage sustained. Under this clause no suit could be commenced until after sixty days at least from the time of the fire. This would leave only ten months instead of twelve months within which time suit could be commenced.

In the 13th condition, the one wherein suit is allowed to be brought "within twelve months next after the fire," is an express proviso that no suit against the company shall be maintained in any court "until after an award shall have been obtained fixing the amount of such claim." As there has been no award in this case, it follows that, if the award clause is to be considered of full force and effect and construed solely with reference to the language used in this particular clause, then the remaining ten months has expired, and by the literal interpretation of independent clauses, which of themselves are plain, clear, and unambiguous, it actually happens in the case that the right of action was barred before it accrued under other provisions; and this condition of affairs is accomplished without any act, fault, or negligence on the part of the insured. This of itself justifies us in going beyond the mere words of any particular clause in order to ascertain the meaning of the clause and the intention of the parties.

The insurance company, it is true, does not rely upon the award clause, and we refer to it simply to illustrate the weakness of its contention that another clause, upon which it does rely, should be literally construed because the language used therein is clear, plain, and unambiguous.

The company might have claimed that, according to the award clause, the suit was brought too soon; but such a contention would be manifestly absurd. Why? Because it is

evident that the parties never intended that such a result should be accomplished under the facts in this case.

This is made perfectly clear by a reference to the other provisions in the policy to the effect that the amount of the loss or damage might be determined by mutual agreement between the parties, and in the event of their failing to agree, then arbitrators might be chosen; and it appearing that the company, after five months of occasional promises to pay, finally decided that it would not pay the loss, this conduct was, of course, a waiver of the right to rely upon the award clause. Upon like reasoning, why should not their conduct in causing a delay of time in the bringing of the suit, when suit was threatened, be a waiver of the time in the limitation clause ?

A policy of insurance which contains conditions reducing the statutory time for the commencement of any suit thereon ought in justice and equity to be so construed, if reasonable under all its terms, as to give the full period of time mentioned in the policy, freed from the provisions of all other clauses of the policy, or from the conduct of the insurance company limiting or attempting to limit the time actually given in the limitation clause.

This, it appears to us, is the consistent and logical view that ought to be taken of such policies of insurance. It is fair to the insurance company and just to the insured. It would prevent either party from taking any undue or improper advantage of the other. The unwary could not be led into a trap and caught by any misrepresentation or delusive promise. The condition in this policy which provides that no suit can be maintained for the loss incurred unless "commenced within twelve months next after the date of the fire" should therefore be construed, in the light of all of the other clauses and conditions, to mean twelve full months, not ten months nor seven months nor one month nor one day, in which to bring suit, exclusive of the time when suit could not be brought either by other clauses or by any conduct of the company preventing the insured from bringing suit. In this case the right to bring suit being postponed in one clause of the policy for sixty days after the proofs of loss were furnished, the twelve months' limitation contained in another clause

does not commence to run until after the expiration of the sixty days. This suit was, therefore, brought in time.

The construction we have given to this policy is in accord with common sense, which is said to be the soul and spirit of the law. It is in unison with sound legal and universally recognized interpretations of written instruments as well as with the justice and equity of the case. It is correct in prin ciple, and is supported by the great weight of the authorities.

Friezen v. Allemania Fire Ins. Co. 30 Fed. Rep. 352.
Vette v. Clinton Fire Ins. Co. 30 Fed. Rep. 668.
Spare v. Home Mutual Ins. Co. 17 Fed. Rep. 568.
Chandler v. St. Paul Fire Ins. Co. 21 Min. 85.
Mayor v. Hamilton Fire Ins. Co. 39 N. Y. 45.
Steen v. Niagara Fire Ins. Co. 89 N. Y. 315.
Ellis v. Council Bluffs Ins. Co. 64 Iowa, 507.
Miller v. Hartford Ins. Co. 70 Iowa, 704.
Barber v. Fire & M. Ins. Co. 16 W. Va. 658.
Murdock v. Franklin Ins. Co. 33 W. Va. 407.
Case v. Sun Ins. Co. 83 Cal. 473.
Owen v. Howard Ins. Co. 87 Ky. 574.

In *Friezen v. Allemania Fire Ins. Co.* the fire occurred June 23, 1885. Proof of loss was made July 31, 1885; the loss was not payable "until sixty days after proof of loss." Suit was commenced February 24, 1886, 7 months and one day after the fire, but within 5 months and 24 days after the sixty days after the proof of loss. The policy provided that no suit should be sustainable unless commenced within six months after the fire had occurred. Bunn, J., held that the suit was commenced in time; "that what the parties contemplated was that, after the loss became due and payable, the assured should have six months within any part of which time he might bring his suit."

In *Vette v. Clinton Fire Ins. Co.*, where the provision in the policy was the same as in the Friezen case except the word "loss" is used instead of the word "fire," Thayer, J., in delivering an oral opinion, hit the nail squarely on the head by saying that he could not see any "good reason for construing the special statute of limitations imported into this contract in such a way as to make it operative during a period when,

by virtue of other stipulations of the contract, the right of action was suspended."

In Chandler *v.* St. Paul Fire and M. Co. the court said:

"It is natural that the parties should have intended to refer the commencement of the period of limitation to the date when the cause of action accrued; and that the time during which the assured could not sue should not be counted as part of the year within which they were required to sue."

In Steen *v.* Niagara Fire Ins. Co. the court said:

"The intention of the defendant was to give the insured a full period of twelve months within any part of which he might commence his action; and having, by postponement of the time of payment, secured itself from suit, it did not intend to embrace that period within the term after the expiration of which it could not be sued. In other words, the parties cannot be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time. Indeed the actual case is stronger. Not only was the remedy postponed, but the liability even did not exist at the time of the fire nor until it was fixed and ascertained according to the provisions of the policy. Having thus made the doing of certain things and a fixed lapse of time thereafter conditions precedent to the bringing of an action, the parties must be deemed to have contracted in reference to a time when the insured, except for that contract, might be in condition to bring an action. Under any other construction the two conditions are inconsistent with each other."

The language used in the various conditions of the policy is that of the insurance company. Admitting then, for the sake of the argument, that it could be fairly claimed that two different constructions might be placed upon the language used in the policy, it is nevertheless a wise and well-settled rule, sanctioned and sustained by all the authorities, that the construction should be adopted which is the most favorable to the insured; and in case of any doubt or uncertainty as to the meaning of words or of inconsistent or contradictory provisions in the policy as inserted by the company, they are to be construed most strongly against the company.

As the insurance company prepares the contract and em-

bodies in it such conditions as it deems proper, it is in duty bound to use language in the various provisions of the policy in such a manner that the insured cannot be mistaken or misled as to the duties and burdens thereby imposed upon him.

The courts have uniformly held that the various conditions of a policy of insurance must be strictly construed against the company and liberally in favor of the insured. This principle is applied to all classes of insurance policies, whether fire, life, accidental, or other kinds.

National Bank v. Ins. Co., 95 U. S. 673.
Moulor v. American Life Ins., 111 U. S. 335.
Wallace v. Germania Ins. Co., 41 Fed. Rep. 742.
Cotton v. Fidelity & C. Co., 41 Fed. Rep. 506.
Graft v. Queen Ins. Co., 38 Minn. 501.
Kratzenstein v. Western Assurance Co., 116 N. Y. 59.
Burkhard v. Travelers' Ins. Co., 102 Penn St., 262.
Philadelphia Tool Co. v. British-Am. Assurance Co. 132 Penn. St. 241.
Rodgers v. Phœnix Ins. Co., 121 Ind. 577.
Illinois Mutual Ins. Co. v. Hoffman, 132 Ill. 523.
Meyer & Co. v. Queen Ins. Co. 41 La. An. 1000.

In *Wallace v. Germania Ins. Co.*, McCreary, J., in construing the award clause in the policy, said:

"If the words employed of themselves or in connection with other language used in the instrument or in reference to the subject-matter to which they relate are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the insured."

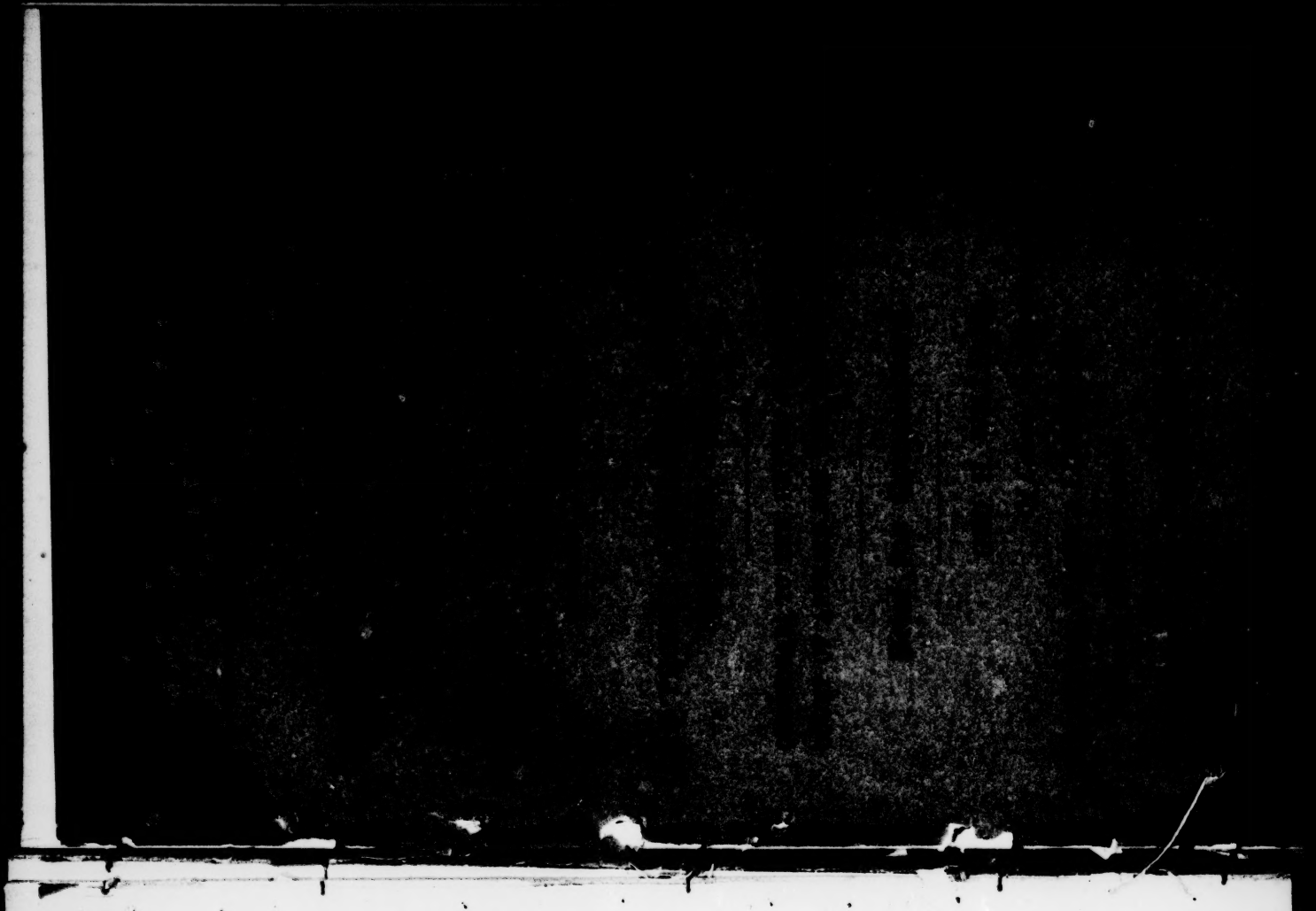
In *Kratzenstein v Western Assurance Co.*, the court said:

"Where an insurance contract is so drawn as to be manifestly ambigious, so that reasonable and intelligent men on reading it would honestly differ as to its meaning, the doubt should be resolved against the company, because it prepared and executed the agreement and is responsible for the language used and the uncertainty thereby created."

In *National Bank v. Insurance Co.*, there was a provision in the policy that if the insured in his application makes any erroneous representation or omits to make known any fact material to the risk, then the "policy shall be void." The insured made an over-estimate as to the value of his property without any fraudulent intent. The insurance company contended that under any proper construction of the contract the assured warranted absolutely and without limitation the truth of the statement as to the value of his property. The court held that this contention could not be sustained, and based its conclusions "upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction rendering it doubtful whether the parties intended the exact truth of the applicant's statement to be a condition precedent to any binding contract, the courts should lean against that construction which imposes upon the insured the obligations of a warranty. The company cannot complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

The judgment of the Circuit Court is reversed and the cause remanded with direction to the court to render a judgment in favor of complainant, as prayed for in the amended bill.

Endorsed: Filed July 18, 1892. F. D. Monckton, clerk.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

JAMES STEEL, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF BEN. HOLLADAY, DECEASED, COMPLAINANT,

v.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, DEFENDANT.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEAL FOR THE NINTH CIRCUIT.

Brief for Complainant.

STATEMENT OF THE CASE.

This is a suit to reform and recover upon a policy of fire insurance. The material facts, as agreed upon in the pleadings, are as follows:

On November 17, 1883, Edward S. Kearney was appointed receiver in the suit of *Ben. Holladay* v. *Joseph Holladay*, then pending in the Circuit Court of the State of Oregon for the County of Multnomah. On April 21, 1884, the defendant corporation issued its policy of insurance to Kearney upon an undivided one-half of the Clarendon Hotel and the furniture therein, in the city of Portland, Oregon. On May 19, 1884, D. P. Thompson was duly appointed receiver in said cause, in the place of Kearney, who had resigned the receivership. On the night of the same day, May 19, 1884, after Thompson had duly qualified as receiver, the property was totally destroyed by fire, without any fault, failure, or neglect on the part of either Kearney or Thompson, or of any other person. On June 27, 1884, Thompson paid to the defendant insurance company the sum of $300.00 as a premium on said policy of insurance, and this money still remains in the hands of the defendant. On November 25, 1885, this suit was commenced by Thompson, as receiver. To the complainant's amended bill the defendant filed a demurrer, which was sustained by the Circuit Court of the United States for the District of Oregon. An appeal was then taken by Thompson to the Supreme Court of the United States, and the judgment of the Circuit Court was reversed. (*Thompson* v. *Phoenix Ins. Co.*, 139 U. S. 299.) Thereupon an answer and a replication thereto were filed in the United States Circuit Court, and upon these pleadings and the evidence the Circuit Court entered a decree dismissing the bill, from

which decree an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit, where the decree of the Circuit Court was reversed, and an order made directing the Circuit Court to grant the prayer of the bill.

The claim for reformation of the policy is founded upon the following language, with which it commences:

"By this policy of insurance the Phoenix Insurance Company of Brooklyn, in consideration of three hundred dollars, and subject to and under the conditions hereinafter mentioned, do insure E. S. Kearney, receiver for *Holladay* v. *Holladay*, against loss or damage by fire to the amount of five thousand dollars, as follows: $4000 on their one-half interest in the four-story frame building occupied as a hotel, and known as the Clarendon Hotel, situate on the northwest corner of North First and F Streets, Portland, Oregon; $1000 on their one-half interest in the hotel furniture, while contained therein. * * * And the said Phoenix Insurance Company hereby agrees to made good unto the said assured, their executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured, as above specified." (Printed record, page 7.)

The complaint claims that the understanding of the parties, at the time this policy was issued, was that the defendant should insure Edward S. Kearney, receiver in the case of Holladay v. Holladay, *or his successors in office or whom it might concern*, but that, by mistake, the policy was written so as to insure

Edward S. Kearney, receiver, alone; and that it ought to be reformed so as to read in accordance with the understanding of the parties. The defendant claims that there was no such understanding, and that the policy was only intended to insure Edward S. Kearney, as receiver, and insures him alone. This is the first question to be considered.

The other questions arise under the following language of the policy of insurance:

"It shall be optional with the company to repair, rebuild, or replace the property lost or damaged with like kind and quality within a reasonable time, giving notice of their intention to do so within sixty days after receipt of the proofs herein required, and until such proofs, plans, and specifications, declarations and certificates are produced, and examinations and arbitrations permitted by the claimant and had, the loss shall not be payable." (Printed record, p. 11.)

* * * * * * * *

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such

claim, any statute of limitation to the contrary notwithstanding." (Printed record, pp. 12-13.)

The complainant alleges that the defendant, by its agents, repeatedly assured Thompson that the defendant would pay the loss, and that by reason of such repeated assurances and promises of the defendant, Thompson was prevented, and neglected and failed, until some time after the expiration of the sixty days from the date of the delivery to defendant of the proofs of loss, to bring his suit upon the policy for the recovery of the loss sustained by the fire. This allegation is denied by the defendant, and upon this issue two questions arise:

1. Was Thompson in fact delayed in instituting this suit for some time after the sixty days from the delivery to defendant of the proofs of loss by the promises and representations of the agents of defendant?

2. Did the limitation in the policy of one year, in which to bring suit thereon, bar this suit, which was commenced thirteen months and twenty-one days after the fire?

Proofs of loss were duly furnished very soon after the fire. The record shows that the suit of Ben. Holladay v. Joseph Holladay was determined in favor of the complainant, that he has since died, and that the complainant herein, James Steel, is the duly appointed and qualified administrator of his estate, and was duly substituted as complainant herein for D. P.

Thompson, receiver, in whose name this suit was commenced.

ASSIGNMENT OF ERRORS.

Presuming that the case is to be tried here as it was in the Circuit Court of Appeals, we submit the following assignment of errors in the decree of the Circuit Court of the United States for the District of Oregon, being the same assignment of errors that was filed on the appeal to the Circuit Court of Appeals for the Ninth Circuit.

1. Said Circuit Court of the United States for the District of Oregon erred in not holding and deciding that the policy of insurance, a copy of which is attached to the bill of complaint herein, should be reformed so as to show that the loss, if any, was to be payable to E. S. Kearney or his successors in office as receiver, instead of being payable to said Kearney, his executors, administrators and assigns.

2. Said court erred in not holding and deciding that the policy of insurance described in the pleadings herein should be reformed as prayed for in complainant's bill of complaint.

3. Said court erred in not holding and deciding that the bar of one year mentioned in the policy of insurance in controversy herein commenced to run at the expiration of sixty days from the date of the fire described in the bill of complaint.

4. Said court erred in holding and deciding that the twelve months' limitation in the policy of fire in-

surance hereinbefore mentioned, within which the assured must sue for loss thereunder, is not waived by conduct of the insurance company calculated to make the assured believe that the loss will be paid, provided such conduct ceases so as to leave a reasonable time within which to sue.

5. Said court erred in holding and deciding that seven months of the twelve is considered ample time in which to bring a suit under the circumstances set out in the next preceding assignment of error.

6. Said court erred in holding and deciding that a limitation of twelve months from the date of the fire within which to sue on a policy of fire insurance commences to run from such date.

7. Said court erred in not holding and deciding that the limitation of one year commenced to run at the expiration of the time during which the receiver, D. P. Thompson, was delayed in bringing suit by the declarations and acts of the insurance company inducing him to believe that a suit to enforce the payment of the loss was unnecessary.

8. Said court erred in not holding and deciding that the defendant insruance company was estopped by its declarations and acts from claiming a forfeiture of the right to recover in this suit under its policy of insurance.

9. Said court erred in not holding and deciding that, as this is a suit to reform a policy of insurance, the bar of one year specified in such policy did not apply, and was not available for the defendant in this suit.

10. Said court erred in dismissing the bill of complaint herein and entering a decree for the defendant.

ARGUMENT.

I.

As to the reformation of the policy.

We will consider the first two assignments of error together. They are, in substance, that the Circuit Court erred in not deciding that the policy of insurance should be reformed as prayed for in the bill of complaint. Judge Hawley, who delivered the opinion of the Circuit Court of Appeals, on this point, says:

"The right of plaintiff to have the policy reformed, if the action can be maintained after it is reformed, so as to be made payable to the receiver or his successor in office, and thereby conform to the intention of the parties—if any reformation in that respect is necessary—is by the admissions in the answer and proofs upon the trial rendered too clear for any discussion upon the subject." (Printed record, pp. 57-58.)

The answer admits that the defendant knew and was distinctly informed by Kearney, when the insurance was agreed upon, that he was merely the receiver in the suit of Holladay v. Holladay, and had no personal interest in the property, and no interest whatever therein except as such receiver, and that the de-

fendant "was also informed, and so the fact was, that such property was owned by either the plaintiff or defendant in said suit of Holladay v. Holladay, and that the said property and the title thereto was in litigation in said suit, and was in possession and under the control of said receiver, as such and not otherwise." (Printed record, p. 24.)

Mr. Kearney testifies (printed record, pp. 41-42):

"I had it (the property) insured as the Holladay property, of course; it is not my own property; everybody knew that; Holladay built the hotel; it was his property. I told him how I wanted it, of course—the loss, if any, to inure to the estate. It was not property of mine personally.

* * * * * * * *

"I insured it for the Holladay estate—for the loss, if any, to be paid to the Holladay estate.

* * * * * * * *

"Q. This policy provides that E. S. Kearney, receiver for the suit of Holladay v. Holladay, is insured, and that the company agrees to make good unto the said assured, their executors, administrators and assigns, all loss and damage that may accrue. Was it the understanding that in case you should cease to be the receiver, the money should be paid to your executors, administrators or assigns? Was there an understanding of that kind?

"A. No. * * * * *

"Q. By whom was this policy prepared?
"A. It was prepared down in the insurance office.
"Q. And delivered to you?
"A. Certainly it was. I was to have sixty days to pay the money in. They did all the writing themselves."

We submit that the admissions of the answer, and this evidence, taken in connection with the language of the policy and the allegations of the bill, clearly show that the words "executors, administrators and assigns," in that portion of the policy quoted on page 3 of this brief, were inserted by mistake, and did not carry out the intentions of the parties. We think it must be assumed, as a matter of course, that the policy was not intended to insure the executors, administrators or assigns of Kearney, when it was known to the defendant that the property was insured for the receiver; for, in the nature of things, the executor, administrator, or grantee of Kearney could in no event have anything to do with the property. It is self-evident that the mistake occurred in using language applicable to the private ownership of property instead of language proper with reference to its official possession. According to the claim of defendant, if Kearney had died or had been removed within a week after the policy was issued to him, the interest of the owner of the property would not have been protected by the policy; which, it must be admitted, was contrary to the intention of the parties when the policy was issued.

We think this court will concur with the court below in holding that the policy was not written so as to carry out the intention of the parties. That such was the fact appears too plain for argument.

Judge Hawley indicates in his opinion that the intent of the parties appears upon the face of the policy itself, and that no reformation is required in order to enable complainant to maintain the suit as representative of the interest of Ben. Holladay in the property. This point was not argued in the Circuit Court of Appeals; but the defendant lays great stress upon it in its application for the writ of certiorari in this case; and it is to be presumed that the point will be again urged in the present argument. Possibly, Judge Hawley may be right in this dictum, but there are grave doubts about it (see *Baldwin* v. *Ins. Co.*, 60 Iowa, 497), and whether right or wrong, we contend that the bill ought not to be dismissed upon that ground.

Defendant's point is that the complainant had a remedy at law upon the policy of insurance, and that therefore a court of equity has no jurisdiction. We claim that this point has been decided against the defendant by this court in the case of *Thompson* v. *Phoenix Ins. Co.*, supra. Justice Harlan, delivering the opinion of this court in the case, says:

"The next question to be considered is whether the amended bill makes a case for the reformation of the policy. Its allegations, which are admitted by

the demurrer to be true, show that before the policy was issued the agreement between Kearney and the company was that the insurance should run to him as receiver, and to his successors, and also to those whom it might concern, and that, by inadvertence, accident, and mistake upon the part both of Kearney and the company, the policy was not so framed. The policy runs to 'E. S. Kearney, receiver for Holladay v. Holladay.' Whether Kearney's successor in the receivership might not recover upon the policy as it is, there being no question of limitation in the case, especially upon proof that the parties intended the insurance to cover the interest which the receiver, whoever he was at the time of the loss, represented, is a question that need not be considered. If, by inadvertence, accident or mistake, the terms of the contract were not fully set forth in the policy, the plaintiff is entitled to have it reformed so as to express the real agreement without the necessity of resorting to extrinsic proof."

Now, the demurrer to the bill of complaint in this case was a general as well as a special demurrer, and distinctly raised the question as to whether or not a court of equity had jurisdiction to reform the policy; and, of course, the point was considered, as the opinion delivered by Justice Harlan indicates, as to whether or not an action at law could be maintained on the policy without any reformation. Assuming this, however, to be so, we understand this court to hold that if, in point of fact, the policy does not express the intention and real agreement of the parties, a suit for its reformation may be maintained in equity; that is to say, that the assured has the right to have

the whole of the contract, as it was made and understood by the parties, incorporated into the policy of insurance, and is not bound to bring an action upon a policy not showing the agreement of the parties, and to rely upon parol or extrinsic proof to show what the contract was.

To defeat a suit in equity, it must appear that the complainant not only has a *remedy* at law, but also that he has a *plain and adequate remedy;* and it is elementary law that courts of equity and courts of law have concurrent jurisdiction over many matters.

The defendant took the ground, after the property insured was consumed by fire, and after consulting its attorneys learned in the law, that no action could be maintained for the loss under the policy by Thompson, because the policy ran to Kearney alone, and not to his successors in office; and it refused to pay the loss exclusively on this ground, and upon no other. Thompson's attorneys were probably of the same opinion; and there is no certainty that if an action at law had been commenced upon this policy, the court would have allowed parol evidence to be introduced to show that the contract was different from that which appears upon the face of the policy. At any rate, it appears to us that the defendant is chargeable with gross inconsistency and injustice in refusing to pay the loss on the ground that an action at law could not be maintained upon the policy, and then defending a suit in equity on the ground that an action at

law *could* have been maintained upon the policy, and that therefore the complainant has no remedy in equity.

We think (independent of the decision of this court, which seems to be sufficient) that the right of the complainant to maintain this suit is well supported by authority. We refer to the following cases:

Hammel v. *Queen Insurance Company*, 50 Wis. 243, in which the court says:

"The averment in the complaint of a mistake in the policy of insurance and the prayer for its reformation give jurisdiction in equity. If the policy should be reformed, the court will retain jurisdiction for the determination of all issues which may be made upon it, and all issues of facts, if required, will be tried by a jury."

Delaware State Fire and Marine Ins. Co. v. *Gillett*, 54 Maryland, 219, in which the court says:

"But where the action arises upon a written contract which from mistake or fraud fails to express the actual agreement of the parties, it is a matter peculiarly within the jurisdiction of a court of equity to reform such contract and to grant relief in accordance with the intention of the parties. The fact, therefore, that the complainant might have enforced the payment of the loss to the property insured in an action at law on this policy is no answer to this exercise of jurisdiction by a court of equity upon the facts stated in the bill."

Ben Franklin Ins. Co. v. *Gillett*, 54 Maryland, 218, in which the court says:

"The law is well settled that where the general agent of a company is entrusted with the powers to make and issue policies and the insured fully and frankly discloses all facts material to the risk, and the agent in making out the policy, through fraud or mistake, fails to state such facts, such error or fraud on the part of the agent cannot be relied on by the company in avoidance of the policy, and a court of equity upon application will reform the policy so as to make it express the real contract between the parties. *Ins. Company* v. *Wilkinson*, 13 Wall. 222; *Ins. Company* v *Mahone*, 21 Wall. 153; *Savings Bank* v. *Charter Oak Co.*, 31 Conn. 51; *Rowley* v. *Empire Ins. Co.*, 36 N. Y. 550; *Columbia Ins. Co.* v. *Cooper*, 50 Penn. 331; *Musters* v. *Madison Ins. Co.*, 11 Barbour, 624; *Peck* v. *New London Ins. Co.*, 22 Conn. 575."

In *Brugger* v. *State Investment Ins. Co.*, 5 Sawyer, 304, Judge Deady holds that a mistake made by the agent of an insurance company in drawing up the insurance papers will be corrected by a court of equity and the policy reformed so as to effectuate the intention of the parties, and that in the same suit after the reformation of the policy a decree will be made for the amount of the loss.

Bailey v. *American Cent. Ins. Co.*, 4 McCrary, 225, in which Judge McCrary says:

"We regard it as well settled by authority and well supported by reason that if the appellant correctly

states his interest, and distinctly asks for an insurance thereon, and the agent of the insurer agrees to comply with his request and assumes to decide upon the form of the policy to be written for that purpose and by mistake of law adopts the wrong form, a court of equity will reform the instrument so as to make it insurance upon the interest named. Such a doctrine is eminently just and equitable, since the insurance company always prepares the contract and inserts therein its own terms."

In *Sias* v. *Roger Williams Ins. Co.*, 8 Fed. Rep. 183, it was contended as it is here that the mistake in the policy was not mutual, but Judge Lowell decided that a court of equity would reform a policy for a mistake of law made in its preparation by an agent of the insurance company.

In *Williams* v. *North German Ins. Co.*, 24 Fed. Rep. 625, Justice Miller, of the Supreme Court, decided that "where a policy of insurance which has been drawn up by the agent of the insurer and merely accepted by the insured does not represent the intention of both parties because of the fault or negligence of the agent, it may be reformed so as to express the contract as it was intended to be made." And he further held that "if the agent of the company knew what interest was intended to be insured, the policy should be reformed so as to properly show such interest."

Maher v. *Hibernia Ins. Co.*, 67 N. Y. 283.

Oliver v. *Mutual Commercial Ins. Co.*, 2 Curtis (C. C.) 293.

Hill v. *Millville Ins. Co.*, 39 N. J. Eq. 66.

Woodbury Savings Bank and Building Association v. *Charter Oak Fire and Marine Ins. Co.*, 31 Conn. 517.

Welles v. *Yates*, 44 N. Y. 530.

Rider v. *Powell*, 28 N. Y. 310.

Visitors of M. E. Church etc. v. *Town*, 20 Atl. Rep. 489.

Ramsey v. *Loomis*, 6 Oregon, 367.

Foster v. *Schmeer*, 15 Oregon, 365.

Fink v. *Queen Ins. Co.*, 24 Fed. Rep. 318.

Spare v. *Home Mutual Ins. Co.*, 17 Fed. Rep. 568.

This last-mentioned case was decided by Judge Deady in the United States Circuit Court for the District of Oregon. He held that where there was an agreement to insure the owners of a warehouse, who were indebted to the plaintiff, for the benefit of the plaintiff, and by mistake the name of the plaintiff, the creditor, was inserted in the policy as the assured, instead of the name of the owner of the property, the plaintiff had the right, in equity, to have the policy reformed so as to show the real understanding between the parties.

II.

As to the limitation.

The third and sixth assignments of error may be considered together. They are to the effect that the Circuit Court erred in holding that the sixty days immediately after the fire during which the receiver was denied the right to bring suit by the terms of the policy, were to be counted as a portion of the year's limitation, or, in other words, that the receiver's right to sue was limited to ten instead of twelve months.

We claim that all the analogies of the law, and the weight of authorities, are in our favor upon this point.

"No rule in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares, that in all cases it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity, which in making the insurance it was his object to secure. When the words are without violence susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted." Wood on Fire Ins., second ed., sec. 58.

Mr. Justice Bradley, in delivering the opinion of this court in the case of *Insurance Co.* v. *Norton*, 96 U. S. 242, says:

"Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made."

And then, referring to several cases, he says:

"These cases show the readiness with which the courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture."

Mr. Justice Harlan, in delivering the opinion of this court in *National Bank* v. *Insurance Co.*, 95 U. S. 678, says:

"We rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

And this doctrine is reaffirmed in *Grace* v. *American Insurance Co.*, 109 U. S. 278.

Confirmatory of this doctrine, the courts have construed away many of the restrictions and conditions of policies of insurance "crouched unseen in the jungle of printed matter with which a modern policy is overgrown."

Take, for example, that clause in insurance policies which provides that no recovery upon such policies shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner provided. This clause is usually conjoined with a clause limiting the right of action to twelve months after the loss, and is quite as positive in its terms. But the courts, by their constructions, have rendered it practically inoperative. Some courts hold that the parties cannot by agreement oust the jurisdiction of the courts; some hold that the award is not a condition precedent, and others hold that the clause amounts to nothing unless a demand for an arbitration has been made in writing.

Wallace v. *German-American Ins. Co.*, 1 McCrary, 335.

Crossley vs. *Connecticut Fire Ins. Co.*, 27 Fed. Rep. 31.

Mentz v. *American Ins. Co.*, 79 Pa. St. 478.

Nurney v. *Fireman's Fire Ins. Co.*, 30 N. W. Rep. 320.

Phoenix Ins. Co. v. *Badger*, 53 Wis. 283.

Again, policies generally provide, as the policy does in this case, that any person procuring the policy shall be deemed the agent of the assured named in the policy, and not of the company, under any circumstances whatever, or in any transaction relating to the insurance. But the courts have treated this clause in policies as of no effect, and have generally held that persons procuring policies, claiming to be the agents of insurance companies, will be held to be their agents, notwithstanding the prohibition in the policies.

Willicutts v. *N. W. Mutual Life Ins. Co.*, 81 Ind. 300.

Home Ins. Co. v. *Duke*, 84 Ind. 253.

Young & Co. v. *Hartford Fire Ins. Co.*, 45 Iowa, 377.

Boetcher v. *Hawkeye Ins. Co.*, 47 Iowa, 253.

Sullivan v. *Phoenix Ins. Co.*, 34 Kan. 170, and cases there cited.

Justice Miller, in delivering the opinion of this court in *Insurance Co.* v. *Wilkinson*, 13 Wallace, 222, comments upon such a clause in policies of insurance with crushing effect.

Policies generally provide, as does the policy in this case, that if the property of the assured be otherwise than an absolute fee simple title, the interest of the insured less than that shall be expressed in the

written part of the policy, and that otherwise the policy shall be void. But the courts have held in numerous cases, and we believe it to be a settled rule, that if the agent of the insurance company has information that the interest of the insured is otherwise than a fee simple title, the company is bound, without regard to the requirement that it shall be so expressed in the policy.

Hunt v. *Mercantile Ins. Co.*, 22 Fed. Rep. 503.

Williams, Adm'r, v. *North German Ins. Co.*, 24 Fed. Rep. 625.

Field v. *Ins. Co. of North America*, 6 Bissell, 121.

Proofs of loss are generally made a condition precedent, but the courts generally hold that if the company denies its liability, or if an adjuster for the company examines and ascertains the loss, proofs of loss are not necessary.

Home Ins. Co. v. *Baltimore Warehouse Co.*, 93 U. S. 527.

Aurora Fire and Marine Ins. Co. v. *Kranich*, 36 Mich. 289.

Dual v. *Fireman's Ins. Co.*, 35 La. Ann. 99.

Etna Ins. Co. v. *Shryer*, 85 Ind. 362.

Carson v. *German Ins. Co.*, 62 Iowa, 433.

Many illustrations might be added of the decisions

of courts showing that these policies of insurance are construed strongly against the insured, and not unfrequently against the letter of the policy, to promote the ends of justice. We do not say that these conditions and limitations are necessarily invalid, but we do say that courts are astute and eager to find reasons for setting them aside, when an attempt like the one in this case is made to use them to defeat a just and honest claim for a loss.

Again, we believe it to be a universal rule, both where the civil law and the common law obtain, that the time during which a person is under a disability to sue is not reckoned as a part of the time which the statute of limitations makes a bar. Statutes of limitation generally provide that the bar which they create shall not commence to run against minors, married women, insane or imprisoned persons, or persons beyond the seas; and, in addition to these, the courts hold that where uncontrollable circumstances create a disability, the statute shall not run during the existence of such disability.

This court has decided, in the case of *Semmes* v. *Hartford Ins. Co.*, 13 Wall. 158, that a suit upon an insurance policy was not barred by a provision in such policy that twelve months after the loss should be a bar to any suit thereafter commenced, for the reason that by the intervention of the civil war the insured was not able to sue the insurance company within that time; and this court has also decided that

the statute of limitations was suspended during the war.

Ross v. *Jones,* 22 Wall. 384.

Now, these two decisions hold that, without reference to the terms of the contract contained in the policy and without reference to the positive provisions of the statute, a bar to a suit does not arise where there is a disability upon the insured to bring a suit, and that his rights to a remedy are not affected during the time that such disability continues.

We submit that, if the reasoning in the above cases decided by this court is sound, and we believe it to be so, by the same process of reasoning it ought to be held that sixty days after the fire should not be reckoned as a part of the bar to this suit, the receiver having been under a disability to sue during that time.

We cannot see why there should be an exception in this case to the universal rule established by legislation, and the uniform course of judicial decisions. It seems to us that the weight of authorities is in favor of our position, and that their ruling is more reasonable than that of the courts holding an opposite doctrine.

We refer to the following cases in support of this position:

Hong Sling v. *Ins. Co.*, 30 Pac. Rep. 307.
Vette v. *Ins. Co.*, 30 Fed. Rep. 668.
Spare v. *Ins. Co.*, 17 Fed. Rep. 568.
Hay v. *Ins. Co.*, 77 N. Y. 243.
Miller v. *Ins. Co.*, 70 Iowa, 704.
McKay v. *Ins. Co.*, 35 Iowa, 174.
Ide v. *Ins. Co.*, 2 Bissell, 333.
Home Ins. Co. v. *Myer*, 93 Illinois, 271.
Martin v. *Ins. Co.*, 44 N. J. L. 487.
Black v. *Ins. Co.*, 31 Wis. 74.
Little v. *Ins. Co.*, 123 Mass. 380.
Peoria Ins. Co. v. *Whitehill*, 25 Illinois, 382.
Andes Ins. Co. v. *Fish*, 71 Illinois, 620.
Ames v. *Ins. Co.*, 14 N. Y. 264.
Ins. Co. v. *Hall*, 12 Mich. 202.
Grant v. *Ins. Co.*, 5 Ind. 23.
Bish v. *Hawkeye Ins. Co.*, 69 Iowa, 187.
Barber v. *F. M. Ins. Co.*, 16 West Va. 658.
Friezen v. *Ins. Co.*, 30 Fed. Rep. 352.
Mayor etc. v. *Ins. Co.*, 39 N. Y. 45.
Ellis v. *Ins. Co.*, 64 Iowa, 508.
Longhurst v. *Ins. Co.*, 19 Iowa, 364.
Chandler v. *Ins. Co.*, 21 Minn. 85.
Killips v. *Ins. Co.*, 28 Wis. 484.
Arthur v. *Ins. Co.*, 78 N. Y. 462.

In re State Ins. Co., 16 Fed. Rep. 756.

Mix v. *Ins. Co.*, 9 Hun, 397.

Barnum v. *Ins. Co.*, 97 N. Y. 188.

Westchester Ins. Co., v. *Dodge*, 44 Mich. 420.

Leach v. *Ins Co.*, 58 N. H. 245.

Case v. *Ins. Co.*, 83 Cal. 473.

Murdock v. *Ins. Co.*, 33 W. Va. 407.

To quote from these numerous decisions would make this brief tiresome. We have examined all of them, and in every one the suit was commenced after the limitation prescribed in the policy had expired; and in every one the suit was sustained. Some of the policies make the limitation six months and some one year; some of the courts give one reason and some another for overruling the limitation, but in many of the cases cited the courts hold, as the court below held in this case, that by a just construction of the policy the limitation does not run against the insured while he is under a disability to sue. We believe that up to date all the decisions of the federal courts, where this question has arisen, have been in favor of our contention, excepting the decision of Judge Deady in this case.

Velte v. *Clinton Fire Ins. Co.*, 30 Fed. Rep. 668.

Friezen v. *Ins. Co.*, 30 Fed Rep. 352.

Spare v. *Ins. Co.*, 17 Fed. Rep. 668.

When this case was before this court upon demurrer to the bill (136 U. S. 287), the decision upon this question was waived, but Justice Harlan, speaking for the court, cited several of the cases named above, indicating, at least, that they were helpful to the argument that the limitation was not a good defense in this suit.

The grounds upon which the cases cited proceed are very well stated in *Hay* v. *Ins. Co.*, 77 N. Y, 248, and in *Friezen* v. *Ins. Co.*, 30 Fed. Rep. 354, and also by Judge Hawley of the court below, whose opinion will be found in full in our brief upon the application for a certiorari in this case. And we respectfully ask the attention of the court to the suggestions in that brief as to the limitation clause of the policy.

We admit that there are decisions adverse to our contention, but we think that to them the maxim found in Broom may be justly applied: "He who considers merely the letter of an instrument goes but skin-deep into its meaning." It seems to us that the insurance company says to the policy-holder, *uno flatu, you shall have*, and *you shall not have*, twelve months in which to bring suit.

We invoke in our favor, in view of the foregoing, a doctrine recognized by this and other courts, to-wit, "When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction rendering it doubtful as to the intent of

the parties, the policy shall be construed most strongly against the company and in favor of the insured, as he might reasonably be presumed to have understood it." Can this court say, in view of the above cited authorities, that this policy is not of doubtful construction? Can this court say that it is entirely clear that the right to sue is limited by this policy to ten instead of twelve months? Is it clear that the receiver and his attorneys understood that the sixty days after the fire, in which they could not sue, was to be counted as a part of the twelve months' limitation? On August 13, 1883, Judge Deady, holding the United States Circuit Court for the District of Oregon, decided the case of *Spare* v. *Home Mutual Ins. Co.*, 17 Fed. Rep. 570, in which he squarely held that the sixty days was not to be considered as a part of the twelve months' limitation. His language is this:

"On the authority of adjudged cases (*Davidson* v. *Phoenix Ins. Co.*, 4 Sawy. 594; *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 389; May Ins. sect. 478) it is admitted by counsel for the plaintiff that this clause in the policy, limiting the time within which a suit may be commenced thereon against the defendant, is valid; but they contend that it must be read in connection with that other clause which provides that a loss does not become payable until sixty days after the proof of that fact is made; and that, taken together, the reasonable construction of them is that the right to sue on the policy being postponed until the loss is payable—namely, sixty days after proof thereof, the twelve months' limitation upon such right does not commence to run until that time. This

construction is supported by the decided weight of authority, and, in my judgment, is correct on principle. *Mayor etc.* v. *Hamilton Fire Ins. Co.*, 39 N. Y. 45; *Hay* v. *Star Fire Ins. Co.*, 77 N. Y. 241; *Barber* v. *Fire and Marine Ins. Co. etc.*, 16 W. Va. 658 (S. C., 37 Amer. Rep. 800); *Chandler* v. *St Paul Fire and Marine Ins. Co.*, 21 Minn. 85; *Steen* v. *Niagara Fire Ins. Co.*, 89 N. Y. 315 (S. C., 42 Amer. Rep. 297); May Ins., sect. 479.

"The language of this policy is that of the defendant, and any ambiguity in its terms must be resolved against it. Taken literally, the clause limiting the time within which the defendant may be sued does provide that a suit on the policy must be commenced within twelve months after the loss has occurred; but the policy also provides that the loss is not payable until sixty days after proof of the fact, and even then the defendant may give notice of its intention not to pay, but to repair or replace. A stipulation that a suit may or must be brought within twelve months from a certain time, implies that the party has the whole twelve months for that purpose—that he may commence a suit on the first day of such period. But if it cannot be commenced until two months of the time has expired, then, in reality, only ten months are given in which to sue. Under this policy the period within which a suit may be brought ought to begin at the time when, by its terms, it can be commenced—when the loss is established, and the claim therefor is due and payable."

This Spare case naturally attracted the attention of lawyers and insurance men on account of the conflicting decisions elsewhere; and it was understood when the decision was announced that the law upon

this question was settled, so far as the federal courts in Oregon were concerned.

The policy in this case was issued April 21, 1884, and this suit was commenced on July 10, 1885. Had not the receiver and his attorneys the right to understand, when the policy was issued and the suit was commenced, that the sixty days after the fire was not a part of the twelve months limitation? It is not improbable, though we know nothing about it, that the attorneys for the receiver did not bring this suit as soon as they might have done, for the reason that they were still hopeful of a settlement and believing that they were perfectly safe in waiting as they did, under the decision in the Spare case.

Judge Deady undertakes to distinguish this case from the Spare case, upon the ground that the Spare policy provided that the suit should be commenced within twelve months next after the "loss," and this policy provides that it shall be commenced "within twelve months next after the fire." We think this was error, for several reasons.

The sole reason assigned by Judge Deady in the Spare case for not counting the sixty days next after the proofs were received as a part of the twelve months' limitation, was that the plaintiff was under a disability to sue during that period. That is precisely the fact in this case. Therefore, as the reasons for the ruling in the Spare case exist exactly in this

case, it must follow that if the ruling in that case was correct, the ruling in this case was incorrect.

It will be noticed that the policy itself in this case uses the word "loss" and the word "fire," as though they signified the same thing. For instance, the policy says that the property is to be estimated at its cash value at "the time of the loss." Do not these words clearly mean "at the time of the fire?" Notice to the company must show how the property was used "at the time of the loss." Do these words mean *at the time of the fire?* Or do they mean that the policy-holder must show how the property was used sixty or ninety days after it was destroyed?

Again, is there any good reason why the courts should violate the common understanding of words for the sake of protecting an insurance company? We undertake to say that not one man in a thousand would understand that his loss does not occur on the day when his house was consumed by fire. To say that the loss occurs after the insurance company gets through contending and quibbling about how much it will pay, appears to us unworthy the courts that have tried to wriggle around the limitation clause upon that ground.

We here renew our reference to the doctrine laid down by this and other courts as to the construction of policies of insurance. We think it is quite clear that the words "loss" and "fire," as used in insurance policies, are equivalent terms; but if we are mistaken

in this, we cannot be mistaken in holding that the opposite view is not free from doubt. Taking into account the different phrases of the policy, the common understanding that a loss occurs at the time property is destroyed by fire, and the decisions of the courts, can it be said that there is no ground for construing this policy in favor of the claim of the insured? There are conflicting decisions upon this as well as upon the other questions in this case. There are two or three decisions upholding the construction of the defendant; and the decisions in *Hong Sling* v. *Ins. Co.*, 30 Pac. Rep. 307; *Case* v. *Sun Ins. Co.*, 83 Cal. 473, and in *Owen* v. *Howard Ins. Co.*, 9 Ky. Law Rep. 147, sustain our contention.

It seems to us that upon this point we are supported by the former decision of this court in this case. Judge Deady, in his opinion, 11 Sawyer, 276, presents sharply the alleged distinction between the terms "loss" and "fire" as the ground of difference between this and the Spare case. One of two things is apparent. This court, in reversing Judge Deady, was not astute enough to discover the distinction made by him, or, if discovered, it was treated as though it was of no consequence. Several decisions are cited in the opinion of Justice Harlan as though they were applicable to this question, not one of which uses the term "fire" instead of "loss;" and, among others, is Spare v. Ins. Co. We do not know upon what ground this court takes jurisdiction of this case by certiorari, but suppose it to be the desirability of having a uniform rule of construing policies of in-

surance in the federal courts. Now, not one policy in a hundred uses the word "fire" instead of "loss" as the beginning of the limitation upon the right to sue; and unless this court holds that these words are equivalent in meaning as used by insurance companies, the disputes and uncertainties as to the law will remain as they are.

Limitations in insurance policies are upheld upon the ground that all questions arising upon them should be settled at an early day, and while evidence is obtainable; but there is nothing in our contention to militate against this doctrine. Insurance companies prohibit suit against them within a certain period after the loss, and ought not to complain if the insured is not charged with delinquency during that period.

Par. 10 of this policy provides for an arbitration, and also for an option of the company to rebuild or replace the property, and further provides that notice of such option, if exercised, is to be given "within sixty days after receipt of proof herein required, and until such proofs, plans and specifications, declarations and certificates are produced, and examinations and arbitrations permitted by the claimant and had, the loss shall not be payable." The literal effect of this clause is to give the company the absolute power to defeat any claim for any loss. But the courts will construe away this effect, where necessary to prevent a failure of justice.

According to the strict letter of the policy, the company is exempt from suit for sixty days after it has received the proofs of loss, which is understood to mean *after the company has received and accepted such proofs.* There is no evidence as to the exact time when the proofs were furnished in this case, but of course it was some time after the fire; and if the period of the disability to sue is not to be taken as a part of the limitation, we are clearly not barred, for this suit was commenced within twelve months after the fire, if the sixty days next thereafter is left out of the count.

Much stress is laid by defendant upon the fact that the policy is a *contract*, by which the insured is bound. It is a contract in name, and nothing else. Insurance companies combine to keep up the rate of insurance, and their policies are substantially alike. The property-holder must take these policies as they are prepared by the companies, or go without insurance. To call such an instrument a contract, as defined by Blackstone, is to draw largely upon the imagination. It is a contract made under duress. If a man wanted to go from Portland, Oregon, to New York, and the railroad company should say to him, "You shall take a ticket exempting us from all liability, or walk," and the ticket was accepted, it would be a *contract* very much like those made by insurance companies.

Some states prohibit these six and twelve months' limitations in policies of insurance. *Small* v. *Ins. Co.*, 51 Fed. Rep. 789.

III.

As to the waiver of the limitation.

The fourth, fifth, seventh and eighth assignments of error may be considered together, and are to the effect that the Circuit Court erred in holding that no part of the limitation prescribed by the policy was waived by the conduct of the company, and that if the receiver had seven months in which to bring suit after the negotiations for a settlement had ceased, the said period of seven months was a bar to the plaintiff's claim.

We desire, upon this branch of the case, to call the particular attention of the court to the precise issue made upon these questions by the pleadings. The bill of complaint, after alleging the payment of the premium of three hundred dollars on June 27, 1884, and the assurances of defendant, at that time, that the loss would be paid, proceeds further to allege that the defendant's agent made other assurances of payment; and it then says that "by reason of said repeated assurances and promises of the said defendant company to your orator, he did neglect and fail, and was prevented for some time after the sixty days after the delivery to said defendant of the proofs of loss had

elapsed, to bring his suit upon said policy, and to recover the loss sustained by the peril insured against."

Defendant's answer denies the assurance or promises, and then proceeds further to deny that the receiver, Thompson, "did neglect or fail, or was prevented for some time or any time after the sixty days after the delivery of said proofs, to bring his suit upon said policy or to recover the loss sustained by the peril insured against."

Let it be noticed that no question arises upon this issue made by the pleadings as to whether the receiver was prevented for three months or six months from bringing this suit by the conduct of defendant; but the precise question is *whether or not the receiver was prevented for some time after the sixty days after the delivery of proofs from bringing the suit.*

We claim that if the evidence sustains the allegation that the receiver was prevented for some time after the delivery of the proofs by the conduct of the defendant from bringing his suit, the question now under consideration has been decided in our favor in a former decision by this court in this case.

The pivotal point before this court upon the demurrer to the bill was, whether or not this allegation in the complaint took the case out of the limitation of twelve months prescribed by the policy; and this court decided that *it did.*

Mr. Justice Harlan, in delivering the opinion of the court in the decision referred to, says:

"Those allegations are to the effect that the company, by its duly authorized agents, assured the plaintiff about thirty days after the fire, and after the acceptance of the proofs of loss, that no question was made as to the loss or its payment, except that the company was considering the fact of the change in the receivership, and that it would undoubtedly pay the loss claimed; that as late as June 27, 1884, the premium of three hundred dollars was paid to the company, which, by its agents, again assured the plaintiff that the loss would be paid as soon as action could be taken; that after sixty days had elapsed from the delivery of the proofs of loss, the company, by its agents, repeatedly gave the same assurances; and that by reason of such promises and assurances he neglected for some time after sixty days from the delivery of proofs of loss to bring suit for the recovery of the loss sustained."

The following is the evidence upon this point:

Q. Who paid the premium on the policy to the company?

A. I paid it after I became receiver.

Q. (Cross) Was it before or after the fire?

A. It was after the fire.

Q. How did you come to pay the premium? Was there anything said to you about it by the company or its agents?

A. The agent stated to me that the premium had not been paid; that it would facilitate settlement; that it was necessary that it should be paid before the settlement; and I paid it.

Q. Out of what funds did you make that payment?

A Out of the funds that came into my hands as belonging to the estate of Ben and Joe Holladay.

Q. State if you at any time after you became receiver expressed any determination to bring a suit against the company, or threatened to bring a suit against the company?

A. I did, if the policy was not paid.

Q. Was there anything said to you at any time by the agents here of the company about settling for the loss at or after the time you threatened to bring a suit against the company?

A. The agent offered to settle for one-half of the loss rather than to have any suit about it—to pay one-half—which I refused to accept.

Q. Was there anything said by the agent to you with reference to the probabilities of a settlement by the company if a suit was not brought?

A. The agent told me he thought the company would pay the amount; he thought they would, but he was not authorized to say; he thought they would pay it, and advised me not to bring a suit; it would complicate matters somewhat, and he thought I had better not do it; urged on me not to do it.

Q. Was that after you had paid the premium, or can you give the date of that conversation or of any such conversations you had with him?

A. It was very soon after the sixty days expired within which I had to do it, but I cannot give the date or time. I have no data, and it has been a good many years since.

Q. Did you delay bringing a suit in consequence of those statements made to you by the agent?

A. I cannot now say; I do not remember.

Q. Were you at any time informed, or did you have any knowledge, that the agent here had no power or right to receive the premium upon that policy?

A. Not to my recollection.

Q. Can you state about when it was that you were first informed that the company would not pay this loss?

A. I cannot give the date, but it was after the sixty days had expired in which to make the proofs; but I cannot give the time.

Q. You say that you were notified that the company declined to pay this loss very shortly after the expiration of the sixty days from the time the loss occurred?

A. Well, I say soon after that; I cannot give the date or the time.

Q. But it was a short time?

A. Yes, it was not long after.

Q. And after receiving that notice, you relied no further upon any expectation that the company would pay voluntarily?

A. No. They promised to refer the matter to the home office, and they were some time, as a matter of course, getting their answers from there; but I cannot give the length of time that they required.

Q. What is your best judgment now as to the time when you gave up any hope of negotiating with the company for a voluntary settlement?

A. I cannot give that time; it may have been one month, it may have been two, it may have been three months.

Q. From the date of the loss, you mean?

A. No, from the date of the sixty days.

Q. Do you recollect having a talk with Mr. Brown, of Brown, Craig & Co., of San Francisco, in regard to the matter?

A. Yes, sir.

Q. Was it from him you got this understanding?

A. That I cannot say, whether it was from him or the local agent here; but the local agent assured me that he would send all the facts to the head office; and I cannot say whether that was in the east or at San Francisco; but he would send all the facts to the office to which he was responsible, and would give me their answer when he received it, which he did.

Q. Brown did notify you that the company would not pay the loss, did he not, in this conversation?

A. I believe he did; that is my recollection.

The bill of complaint alleges that "about thirty days after the fire, and after the acceptance of said proof of loss by defendant, your orator threatened to commence a suit at once to recover said loss, and informed the agents of the defendants that he would do so. That, thereupon, said defendant, by its said duly authorized agents, stated to your orator that under the provisions of said policy of insurance no suit could be brought until sixty days after the receipt of the proof of loss had elapsed, and directed your orator's attention to the provisions in said policy limiting the commencement of a suit, as by said agents stated."

To this the defendant answers as follows: "This defendant is informed and believes it to be true that about thirty days after said fire, to wit, on the 6th day of June, 1884, and after the acceptance of said proofs, the said complainant threatened to commence suit at once to recover said loss and informed the

agents of the defendant that he would do so and is informed and believes it to be true that the said local agents of this defendant thereupon stated to said complainant that under the provisions of the said policy no suit could be brought until sixty days after the receipt of the proofs of loss had elapsed, and directed his attention to the provisions in said policy so limiting the commencement of suit."

We quote these paragraphs from the pleadings to show that it is a fact that the receiver threatened to sue the defendant, and that it is also a fact that the agent of the defendant interposed to prevent a suit. It is admitted that a suit was discussed between the parties.

Thompson testifies that after the expiration of the sixty days the agent told him that he thought the company would pay the amount; "he thought they would, but he was not authorized to say; he thought they would pay it, and advised me not to bring a suit; it would complicate matters some what, and he thought I had better not do it; urged me not to do it."

Had not the receiver a right to believe from these representations that the company would pay the loss, in view of the fact, which ought to be kept in mind in considering this matter, that the only objection made by the company was a change in the receivership? Certainly no company having any regard for

its reputation would be expected to refuse payment upon such a purely technical ground.

We claim the facts to be that Thompson threatened to sue the company; that the agent of the company in Portland persuaded him not to bring suit, telling him that he believed that the company would pay the loss; that the only question under consideration by the company was whether or not the change of receivers had forfeited the claim of the insured under the policy; that this matter was referred by the local agent to the home office in Brooklyn; that Thompson was induced by the local agent to wait until the home office made and reported its decision; and that Thompson was notified of the decision of the home office about August 27, 1884. We think this statement is supported by the evidence and the pleadings, and is a reasonable and fair conclusion from all the circumstances of the case. And if this statement is true, then it follows that the receiver was delayed "*some time*" in bringing the suit by the conduct of the defendant acting through its agents.

Defendant relies upon the answer which Thompson made to a certain question, which answer was quite surprising, in view of the fact that he stated positively in his complaint that he was prevented for some time in bringing a suit by the promises and assurances of the defendant; and this answer, upon which the defendant relies, is inconsistent with the statement of facts which he makes, which statement shows that he

did threaten to bring a suit, and that he *was* prevented from carrying out that threat by the defendant's agent. Thompson says that it was a month, or it may have been two or three months, after the expiration of the sixty days before he was notified of the decision of the home office; and it is clear that up to that time negotiations were pending, and Thompson had reason, from the assurances of the agent, to believe that the loss would be paid without litigation. Thompson was acting as a receiver, and it was his duty to the estate which he represented to refrain from litigation as long as he possibly could and thus avoid expense.

We are not familiar with the practice of this court upon writs of *certiorari* to the Circuit Court of Appeals; but we do not suppose that this court will review and reverse the decision of the Circuit Court of Appeals upon a mere question of fact. The Circuit Court of Appeals was of the opinion that the receiver was delayed by the conduct of the defendant; and we presume that this court will treat that as a fact, and determine the law of the case as applicable to such fact. We take it that upon writs of certiorari this court will confine itself to such questions of law as arise upon the record. We may be mistaken in this, but we present the matter as it occurs to our mind.

Judge Deady, in one part of his opinion in this case, assumed that the receiver had been delayed as represented in the bill of complaint, but claimed that

as seven months had elapsed between the end of the negotiations for a settlement and the end of the twelve months, said seven months was a bar to the receiver's suit. We think this is a new doctrine, and we have not been able to find any decision upon a fire insurance policy sustaining Judge Deady's position, though we believe there is a case in Michigan upon a life insurance policy where there is an expression indicating an approval of this doctrine. The decision in this case that the seven months is a bar is in direct conflict with Judge Deady's decision in the Spare case. In that case no excuse was offered by the plaintiff, nor did he pretend to have any excuse for not bringing a suit within twelve months; but he claimed that he had a right to bring a suit at any time within twelve months and sixty days, because the law gave him a right to all that time; and Judge Deady sustained the plaintiff's claim.

We do not see how this practice of the carving up of limitations in insurance policies can be reconciled with the former decision of this court in this case. It did not appear affirmatively in the bill of complaint (the demurrer to which was overruled by this court)

whether more or less, it was sufficient, in the judgment of this court, to take the case out of the limitation clause of the policy; for the suit was not brought until thirteen months and twenty-one days after the fire.

If this court intended to decide that the conduct of the company must delay the suit the entire twelve months to entitle the insured to bring suit afterwards, it was a very easy thing for this court to have said so, and affirmed the decision of the lower court, because the bill of complaint does not show any such thing. The record showed that the suit was commenced thirteen months and twenty-one days after the fire, and that the plaintiff was prevented from suing for "some time" after the sixty days by the conduct of defendant. We cannot understand this decision with the construction put upon it by the defendant; but its meaning is very clear if the "some time" (whatever that may be) is added to the twelve months. How could this court find that a suit instituted one month and thirteen days after the expiration of the twelve months was in time, unless, for some reason, the one month and thirteen days were added to the twelve months?

We object to Judge Deady's limitation of seven months, because, instead of settling any rule upon this subject, it only makes the uncertainty of the law more uncertain. According to this ruling, whether the limitation shall be eleven months or one month

or any intervening number of months is wholly discretionary with the court. One judge may hold that one month out of the twelve after the negotiations for a settlement have ceased, is a reasonable time in which to sue, and other judges may hold otherwise, differing from each other; and so the law as to this matter would be an unknown quantity. Why should there be an inflexible iron rule requiring the insured to bring his suit within twelve months after the fire, while the insurance company can fix the limitation at any time to suit its convenience or interests? Suppose the company should hold the insured off by a promise to pay for the whole twelve months, would the limitation in the policy be a bar in that case? If so, what would it be? Can any good reason be given why the rule should not be, that if the insured is induced to delay his suit for a certain period of time by the representations or conduct of the company, he shall have twelve months from the time when the negotiations are broken off and he is notified that the company has decided not to pay, in which to bring suit? It seems to us that this would be a reasonable and just rule, and would prevent the company from taking advantage of the insured, for which it has so many opportunities under its policy. This point has been expressly decided in our favor by the Supreme Court of Wisconsin, from whose opinion in the case of *Killips* v. *Putnam Fire Ins. Co.*, 28 Wis. 483, we quote as follows:

"It does not seem to require much argument to

demonstrate that if by any act or omission of the responsible officers and agents of the defendant, the plaintiff should be induced to suspend action in the premises for a given time, such time should not be deemed a part of the twelve months to which the right of action is limited by the original contract. * * * The plainest principles of justice demand that the time thus lost by the plaintiff without any fault on his part, but through the fault of the defendant, should be added to the term within which they contracted in the first instance that the action should be commenced, and the plaintiff be not barred of his remedy on the policy until such additional time has expired."

In *Andes Ins. Co.* v. *Fish*, 71 Illinois, 625, suit was brought after the limitation of twelve months had expired, and the suit was sustained because the insured, at the instance of the agent of the insurance company, "forbore bringing suit for two or three months."

Suppose a six years' statute of limitation runs against a party for five years, and he then makes a new promise to pay, and a suit is brought five years after the new promise, has the court a right to dismiss the suit because there has been unreasonable delay in bringing it? Has the court a right to apportion the time between the parties according to what it thinks reasonable or unreasonable, or must it be governed by the statute? Has the court in this case any right to say that the limitation shall be seven months when the policy says it shall be twelve months? We think the law implies that any time during which the suit is

delayed at the request of the company, shall not be considered as a part of the twelve months' limitation.

The ninth assignment of error is as follows:

"Said court erred in not holding and deciding that as this is a suit to reform a policy of insurance, the bar of one year specified in such policy did not apply, and was not available for the defendant in this suit."

We refer, in support of this assignment, to the case of *Hay* v. *Ins. Co.*, 77 N. Y. 235, which was a suit to reform a policy, and in which the court says:

"The action is not for a claim by virtue of this policy, but to compel the defendant to give a policy according to the agreement of the parties. The policy is the same as though no policy had been given, and the action was for a specific agreement to insure. *The limitation does not apply.*"

The same doctrine is maintained in the case of *Wells* v. *Yates*, 44 N. Y. 532.

The court will notice that the answer admits that "said complainant (the receiver) and his predecessor (Kearney) have complied with all the conditions of said policy, save those respecting change of title or possession of the property insured, and the commencement of suit or actions within twelve months

after date of the fire." The question as to change of title or possession has been settled by the former decision of this court, and all that remains is to determine whether or not the receiver was delinquent as to time.

The policy was issued April 21; the fire occurred May 19; and on June 27, 1884, and after the proofs of loss had been received by the company, and thirty-seven days after the fire, the defendant demanded the $300 premium, which was paid to him by the receiver. Can any one doubt that the receiver believed, when he paid the premium, that the loss would be paid? Was not this act of demanding and receiving the premium after the proofs of loss had been received a distinct admission by the company that it would pay the loss? Had not the receiver a right to act upon this admission until he was notified that the company had decided not to pay? This $300 was not taken by the company in ignorance of its rights; for Thompson testifies that the agent knew—and the proofs of loss showed—the change in the receivership.

One of two things must be true. Either all parties concerned believed at the time the premium was paid that the loss would be paid, or the money was taken by the company with the intention of cheating the receiver out of it.

There is a statement in Judge Deady's opinion which perhaps deserves a word of notice. He says that five months and two days after the fire the receiver brought a suit similar to this, which he dismissed because the receiver had not obtained the consent of the court to bring the suit. No evidence of any such suit was given in this case; and counsel for the administrator had no knowledge of any such suit until the opinion of Judge Deady was delivered, and, therefore, had no opportunity to explain the delay which occurred between the dismissal of that suit and the commencement of this.

We submit that the learned judge had no right to make this statement, as it was entirely outside of the record. He might as well have set up in his opinion, as a bar to this suit, some judgment of which there was no evidence in the case.

We take particular exception to the statement of Judge Deady that, on account of the dismissal of the first suit, there could not be any truth in the allegation of the amended bill as to the cause of delay in bringing this suit. The bill simply alleges that the receiver was delayed "some time," and the evidence shows, as we think, that he was delayed until the 27th day of August, 1884. It has never been pretended by anybody, at any time, that the delay extended beyond the 27th day of August; and, therefore, the bringing of the first suit is not at all inconsistent with the allegation in the bill or the evidence in the

case. What we claim is that the time between the date of the fire and the 27th day of August should be deducted from the twelve months, or that the receiver had twelve months after August 27th in which to bring suit. If there is nothing in this claim, then there is nothing in this point.

We beg, in conclusion, to invite the attention of the court to our brief upon the application of the defendant for the writ of certiorari in this case; and we now move to dismiss said writ of certiorari. We are emboldened to make this motion by the decision of this court in the case of *American Construction Co.* v. *J. T. & K. W. Ry. Co.*, 13 S. C. Rep. 759, in which Mr. Justice Gray delivers the opinion of the court and, after referring to the clause of the act of 1891 providing for a certiorari to the Circuit Court of Appeals from this court, says:

"This authority has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Lau Ow Bew's Case*, 141 U. S. 583; *Id.*, 144 U. S. 47; *In re Woods*, 143 U. S. 202. Accordingly, while there may have been many applications to this court for writs of certiorari to the

Circuit Court of Appeals under this provision, two only have been granted, the one in *Lau Ow Bew's Case*, above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in *Cunard Steamship Co.* v. *Fabre*, 13 Sup. Ct. Rep. 1045, an admiralty case, which presented an important question as to the rules of navigation, and in which the decree of the Circuit Court of Appeals for the second circuit reversed a decree of the district judge (53 Fed. Rep. 288) and was dissented from by one of the three circuit judges; and in each of those cases the Circuit Court of Appeals had declined to certify the question to this court."

The case from which the above citation is made was decided March 27, 1893, and the certiorari in this case was granted in January, 1893. Possibly the court will be willing to give this matter further consideration, as the opinion of Mr. Justice Gray would indicate that the decision granting the certiorari had escaped his attention.

We venture to suggest that when the opinion of the court in this case is published, and it appears thereby that the court took jurisdiction by virtue of the writ of certiorari, infinite trouble to this court will be the result; for it is very difficult to see how this case differs from hundreds of others in the Circuit Courts of Appeals of the different circuits in importance, or what there is about it that is extraordi-

nary which should require this court to intervene with its extraordinary writ of certiorari.

Respectfully submitted.

GEO. H. WILLIAMS,

Of Counsel for Complainant.

WILLIAMS, WOOD & LINTHICUM,

Attorneys for Complainant.

No. 1074
M. P. Ry. Co.
J. Baier, Atty.

MAP
of
Weeping Water
DEPOT
AND
Grounds.

A. Madole C.E.

Scale 50ft to the inch.

The State of Nebraska } ss
Cass County } Sept 20 '90.

I A. Madole hereby certify that I am a practical Surveyor and Civil Engineer that I made the forgoing plott and survey from actual measurements in the field and that the same is correct in every particular

A. Madole
Surveyor & Civil Engineer

Randolph St

Elm Street

Depot

Platform

Switch

R. Bailey Door

Reservoir

Pump House

Office

Coal House

Front Platform

Base St